132-565

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~288~~ 114

THE RIO GRANDE RAILROAD COMPANY, APPELLANT,

vs.

P. S. WILTZ, JR., DATIVE TESTAMENTARY EXECUTOR OF A. J. GOMILA; ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 2, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 388.

THE RIO GRANDE RAILROAD COMPANY, APPELLANT,

vs.

P. S. WILTZ, JR., DATIVE TESTAMENTARY EXECUTOR OF A. J. GOMILA; ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY, Appellants,
vs.
A. J. GOMILA *et als.*, Appellees. } No. 11013.

George L. Bright, Esq., appearing for appellants; Rouse & Grant and Jonas & Nixon, Esqs., appearing for appellees.

Transcript of Appeal.

Appeal returnable to the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October, A. D. 1886.

1 *Transcript. Filed May* 4, 1885.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA and THE RECORDER OF MORTGAGES. } No. 14029. Division A.

Petition. Filed April 9th, 1885.

The petition of the Rio Grande Railroad Company, a corporation established and created under the laws of the State of Texas and whose domicil is in Brownville, Texas, shows—

1st. That on the 5th January, 1885, judgment was rendered by the United States court for the 5th circuit and eastern district of Louisiana in favor of your petitioner and against Gomila and Co. and Anthony J. Gomila and Larned Torrey *in solido* for $26,731.97, twenty-six thousand and seven hundred and thirty-one dollars and 97 cents, with interest, at 5 per cent. per annum, from 1st January, 1884, until paid, for a debt due your petitioner before the 8th Feb'y 1884.

2nd. That on 17th January, 1885, your petitioner recorded said judgement in the mortgage office for the parish of Orleans, in Book 275, fo. 172, and the same became a judicial mortgage on all the immovable property of Gomila & Co., Anthony J. Gomila & Larned Torrey, in the parish of Orleans.

3rd. That at the time said judgement was recorded as aforesaid and now Anthony J. Gomila was the owner of a certain por-
2 tion of ground situated in the sixth dist. of this city, in the square bounded by Nayades or St. Charles street, Edmond or Calhoun, and St. Patrick streets and Henry Clay avenue, designated by the letter " A" on a sketch made by J. A. D'Hemecourt, deputy

city surveyor, on 9th July, 1872, annexed for reference to an act of sale by D. A. Burthe to Mrs. Robert O. Butler, passed in the office of James Fahey, a notary public, in this city, on 26th October, 1872, according to which sketch said portion of ground measured in American measure 169 ft. front on Nayades street, 366 feet 5 inches 4 lines in depth and front on Henry Clay avenue, 325 feet 9 inches 1 line in depth on the line which divides it from the portion of ground designated by the letter "B" on said sketch, and said portion "A" forms the corner of St. Charles street and Henry Clay avenue, and said above-described property, "A" & "B," forms the whole of the certain square of ground which is designated by the number 90 on a plan drawn by Nemizzer, surveyor, the 24th Jan., 1854, deposited for reference in the office of Achille Chiappella, late a notary public, in this city, and the portion marked "A" forms the half towards Henry Clay avenue of the above square No. 90, together with the buildings and improvements thereon, acquired by Anthony J. Gomila from the Hibernian Insurance Company on Feb'y 8th, 1884.

4th. That there is inscribed on the books of the recorder of mortgages for the parish of Orleans against the name of Anthony J. Gomila and against said property an inscription of a mortgage made by said Anthony J. Gomila in favor of the commercial firm of Gomila and Co. by act before Samuel Flower, a notary public, dated 8th Feb'y, 1884, to secure the sum of $18,000. Your petitioner shows
3 that by said act the said A. J. Gomila acknowledged to owe to the firm of Gomila & Co. the said sum of $18,000, loaned and advanced to him on the 8th Feb'y, 1884, and for said $18,000 made his four promissory notes made by him and to the order of and endorsed by himself, three for $5,000 each and one for $3,000, the three notes for $5,000 each payable 1, 2, & 3 years after date, respectively, and the $3,000 note payable three years after date.

5th. Your petitioner shows that by virtue of an *alias* writ of execution, issued in its favor on its aforesaid judgment, it caused the marshal of the United States for the circuit court of the United States for the 5th circuit of the United States for the 5th circuit and eastern dist. of Louisiana to seize the aforesaid described property of Anthony J. Gomila; that the seizure and sale of said property are obstructed and prevented by the aforesaid inscription of mortgage. Now, your petitioner alleges that said mortgage is fictitious and is a fraud committed by said A. J. Gomila to cover his property and to prevent the seizure and sale thereof; that it is not true, as stated in said act of mortgage, that on the 8th Feb'y, 1884, the said firm of Gomila & Co. loaned and advanced to A. J. Gomila the sum of $18,000 or any other sum of money; and your petitioner alleges that by reason of said fraud the aforesaid notes, amounting in all to $18,000, are null and void; that after they were made and received by Larned Torrey, who accepted the act of mortgage, they were surrendered to A. J. Gomila, and thereby were cancelled, and they have been ever since in his custody or under his control, or in the custody and control of some confederate, whom, when discovered, your
4 petitioner prays leave to make a party hereto.

Your petitioner shows that it fears that the said Anthony J. Gomila will, during the pendency of this suit, part with and dispose of said promissory notes.

The premises considered, your petitioner prays that a preliminary injunction issue enjoining and prohibiting Anthony J. Gomila from parting with and disposing of in any way whatever the aforesaid four promissory notes made by him and to the order of and endorsed by himself, three for $5.000 each and one for $3,000; the three notes for $5,000 each payable 1, 2, & 3 years after date, respectively, and the $3,000 note payable three years after date, all dated Feb. 8th, 1884; that said Anthony J. Gomila and John J. O'Brien, recorder of mortgages for the parish of Orleans, be cited to answer this petition, and for judgment in favor of petitioner and against Anthony J. Gomila and John J. O'Brien, recorder for the parish of Orleans, cancelling and annulling and erasing from the books of the mortgage office the mortgage granted by Anthony James Gomila in favor of the commercial firm of Gomila & Co., composed of the said A. J. Gomila and Larned Torrey, per act before Samuel Flower, notary public, dated Feb'y 8th, 1884, to secure the sum of $18,000, and recorded in Book 273, fo. 353, on Feb'y 18th, 1884; that the preliminary injunction be made perpetual, and that the said Anthony J. Gomila be ordered to surrender the aforesaid promissory note; and your petitioner prays that he may have such further and other relief in the premises as the nature of his case shall require and as — this honorable court shall seem meet.

(Signed) GEO. L. BRIGHT,
Counsel for Pet'r.

5 *Affidavit on Petition.*

Charles Maduell, sworn, says he is the duly authorized agent of the petitioner, the Rio Grande Railroad Company; that all the allegations in the foregoing petition are true to the best of his knowledge and belief.

(Signed) C. MADUELL.

Sworn to and subscribed before me April 8th, 1885.

(Signed) FRANK HEBERT, *Not. Pub.*

Order.

Let the injunction issue as prayed for upon the petitioner giving bond, according to law, in the sum of three hundred dollars.

New Orleans, April 9th, 1885.

(Signed) A. L. TISSOT, *Judge.*

Bond of Injunction. Filed April 9th, 1885.

Know all men by these presents that we, The Rio Grande Railroad Company, as principal, and Charles Maduell, as security, of the city of New Orleans and State of Louisiana, are held and firmly bound unto Gomila & Co., A. J. Gomila and Larned Torrey, in the

sum of three hundred dollars, lawful money of the United
6 States of America, to be paid to said parties, their heirs, executors, administrators, and assigns; for which payments, well and truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, administrators firmly by these presents.

Sealed with our seals and dated the 8th day of April, in the year of our Lord 1885.

Whereas the said Rio Grande Railroad Company has this day presented a petition to the honorable the civil district court for the parish of Orleans praying for a writ of injunction:

Now, the condition of the above obligation is that we, the above-bound Rio Grande Railroad Company and Charles Maduell, will well and truly pay to the said Gomila & Co., A. J. Gomila & L. Torrey, the defendants in said injunction, all such damages as they may recover against us in case it should be decided that the injunction was wrongfully obtained.

(Signed) RIO GRANDE RAILROAD CO., [SEAL.]
Per C. MADUELL.
(Signed) C. MADUELL. [SEAL.]

Writ of Injunction.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA and JNO. J. O'BRIEN, Recorder of Mortgages. } No. 14029.

The State of Louisiana to Anthony J. Gomila, Esq., Greeting:

7 You are hereby prohibited and enjoined, in the name of the State of Louisiana and of the civil district court for the parish of Orleans, from parting with and disposing of in any way whatever four several promissory notes made by you and to the order of and endorsed by yourself, three of said notes for $5,000 each and one for $3,000, the three notes for $5,000 each payable 1, 2, & 3 years after date, respectively, and the $3,000 note payable three years after date, secured by mortgage by act before Samuel Flower, notary public, dated 8th Feb'y, 1884, on property fully described in the petition of the plaintiff in this suit, and you are so to remain enjoined and prohibited until the further order of the court.

Witness the Honorable A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Rightor, Henry L. Lazarus, judges to [of] our said court, this 9th day of April, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and ninth year of the Independence of the United States.

(Signed) JAS. D. RANKIN, *D'y Cl'k.*

Sheriff's Return on Writ of Injunction. Filed April 15th, 1885.

Received April 9th, 1885, and on the same day, month, and year I served a copy of the within writ of injunction personally on Anthony J. Gomila, defendant herein.

Returned the same day.

(Signed) CHAS. AUTH, *D'y She'f.*

8 *Citation.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA and THE RECORDER OF MORTGAGES. } No. 14029.

Anthony J. Gomila, New Orleans:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the civil district court for the parish of Orleans within ten days after the service hereof.

Witness the Honorable A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Rightor, Henry L. Lazarus, judges of the said court, this 15th day of April, in the year of our Lord 1885.

(Signed) JAS. D. RANKIN,
Deputy Clerk.

Sheriff's Return on Citation. Filed April 20th, 1885.

Received April 15th, 1885, and on the 17th day of April, 1885, I served a copy of the within citation and accompanying petition personally on Anthony J. Gomila, defendant herein.

Returned same day.

(Signed) P. A. McINTYRE, *D'y Sh'ff.*

9 *Citation.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA and THE RECORDER OF MORTGAGES. } No. 14029.

John J. O'Brien, recorder of mortgages for the parish of Orleans, New Orleans:

You are hereby summoned to comply with the demand contained

in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the civil district court for the parish of Orleans within ten days after the service hereof.

Witness the Honorable A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Righ'or, Henry L. Lazarus, judges of the said court, this 15th day of April, in the year of our Lord 1885.

(Signed) JAS. D. RANKIN, *D'y Clk.*

Sheriff's Return on Citation. Filed April 20th, 1885.

Received April 15th, 1885, and on the 16th of April, 1885, I served a copy of the within citation and accompanying petition on John J. O'Brien, recorder of mortgages for the parish of Orleans, through Geo. Guinault, his chief clerk, in person.

(Signed) CHAS. CUNES, *D'y Sh'f.*

10 *Petition for Removal. Filed April 23d*, 1885.

Civil District Court, Parish of Orleans, Division "A."

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA & THE RECORDER OF MORTGAGES. } No. 14029.

The petition of A. J. Gomila, one of the above-named defendants, shows to the court as follows:

That the above suit was begun against your petitioner, A. J. Gomila, and the recorder of mortgages in the civil dist. court for the parish of Orleans, State of Louisiana, by the filing of a petition and the service of citation and an injunction and a copy of the petition therein on the defendants.

That your petitioner had not yet filed his answer, but that as to your petitioners said cause is now pending; that said cause has not been tried, and that this is the first term of said civil district court at which the same could by any probability be tried.

That at the time said suit was begun and at the present time the plaintiff was and is a citizen and resident of the State of Texas, and the defendants, A. J. Gomila and the recorder of mortgages, were and are citizens and residents of the State of Louisiana.

That the matters in dispute in said suit, and for which said suit is brought, exceeds the sum of five hundred — exclusive of costs; that the defendant, the recorder of mortgages, has no interest in this action or the matter in dispute therein or in any of the property therein mentioned, being merely a nominal defendant.

11 And the defendant hereby offers Wm. Grant, of this city and parish, as surety for his entering in the circuit court of the U. S. for the district wherein said suit is pending, at the time required by law, a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court if said court should hold that said suit was wrongfully or improperly removed thereto, and also for his appearing and complying in all respects with the

provisions in the premises of the act of Congress of the U. S. passed March 3rd, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the U. S. and to regulate the removal of causes from State courts, and for other purposes." Wherefore defendant prays this honorable court that said case be removed into the circuit court of the U. S., 5th circuit, eastern district of Louisiana, and that this court proceed no further in the premises.

(Signed) A. J. GOMILA, *Petitioner.*
" J. WARD GURLY, JR.,
Att'y for Pet'r.

Affidavit on Petition for Removal.

STATE OF LOUISIANA, }
City of New Orleans, } *ss:*

A. J. Gomila, being sworn, says that he is the above-named petitioner and one of the defendants in the above-entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and
12 belief, and as to those matters that he believes it to be true.

(Signed) A. J. GOMILA.

Sworn to and subscribed before me this 23rd day of April, 1885.
(Signed) CHARLES J. THEARD, *Not. Pub.*

Bond for Removal. Filed April 23rd, 1885.

Civil District Court, Parish of Orleans, Division "A."

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA and THE RECORDER OF MORTGAGES. } No. 14029.

Undertaking on removal of cause.

Know all men by these presents that I, A. J. Gomila, as principal, and Wm. Grant, as surety, of the city of New Orleans, State of Louisiana, are jointly and severally held and firmly bound unto the Rio Grande Railroad Co., of Brownsville, Texas, in the sum of five hundred dollars ($500.00); for which, well and truly to be paid unto the said Rio Grande R. R. Co., its heirs, executors, administrators, successors, and assigns, — firmly by these presents. Sealed with our seals and dated this 23rd day of April, 1885.

The condition of this obligation is such that if the said A. J. Gomila, one of the defendants in the suit now pending in the civil dist. court, parish of Orleans, State of Louisiana, shall enter
13 in the circuit court of the U. S. for the 5th circuit, eastern district of Louisiana, on the first day of the next session thereof, or within twenty days thereafter, a copy of the record in said suit, and shall pay all costs that may be awarded by said cir-

cuit court if said court shall hold that said suit was wrongfully and improperly removed thereto, and shall also then appear, then this obligation to be void, and otherwise to remain in full force and effect.

In witness whereof said obligors hereunto set their hands and seals this 23rd day af April, 1885.

(Signed) A. J. GOMILA.
" WM. GRANT.

Order Removing Cause.

On the pleadings and proceedings herein and on the petition and bond filed herein by the defendants, A. J. Gomila, under the provisions of an act of a Congress of the U. S., passed March 3rd, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the U. S. and to regulate the removal of causes from State courts, and for other purposes," and on motion of J. Ward Gurly, Jr., counsel for defendant, it is ordered that the security offered by the defendants, A. J. Gomila, be approved, and that the State court proceed no further in this cause, and that this cause be removed into circuit court of U. S. for the 5th circuit, eastern dist. of Louisiana.

New Orleans, April 23rd, 1885.

(Signed) A. L. TISSOT, *Judge.*

14 *Certificate.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, W. J. McGeehan, clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing nineteen pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced, upon the trial of the cause wherein The Rio Grande Railroad Co. is plaintiff and A. J. Gomila and the Recorder of Mortgages are the defendants, instituted in this court and now in the records thereof under the No. 14029 of the docket thereof.

In witness whereof I have hereunto set my hand and affixed the impress of the seal of the said court, at the city of New Orleans, on this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and ninth year of the Independence of the United States of America.

W. J. McGEEHAN, *Clerk.*

15 *Answer of A. J. Gomila. Filed May 4th, 1885.*

Circuit Court of the United States for the 5th — and East. Dist. of La.

THE RIO GRANDE RAILROAD COMPANY
vs.
A. J. GOMILA and JOHN J. O'BRIEN, Recorder of Mortgages. } No. 11013.

Now comes A. J. Gomila, one of the defendants, and, for answer

to plaintiff's petition, denies all and singular the allegations thereof, except in so far as may be hereinafter specially admitted.

Further answering, this defendant admits the existence of the judgment in favor of plaintiff, as set forth in said petition.

Further answering, this defendant admits the making and executing of the mortgage mentioned in said petition, and avers that the same was and is a true and real and *bona fide* mortgage, executed and given for a valuable consideration, in the due course of business, and that the said notes described in and secured by said mortgage are not now and have not at any time since the issuance thereof been in the possession or under the control of this defendant; and this defendant specially denies that said mortgage is fictitious or a fraud committed by this defendant to cover his property, as charged by plaintiff.

Further answering, this defendant avers that plaintiff was advised before the execution of the said mortgage of the exact con-
16 dition of the title to and this defendant's interest in said property, and subsequently plaintiff was also advised of said mortgage and the reason and necessity therefor and the use to which the money thereby derived was put; and plaintiff and its agents herein, who made the affidavit to the allegations of said petition, well knew the same to be untrue and false, and this defendant had been caused and suffered very large and heavy losses, damage, and injury, besides the greatest vexation and annoyance, by the said wilfully false and malicious charges aforesaid; and this defendant specially reserves his right to sue for and recover full compensation and redress from both plaintiff and its said agents.

Wherefore this defendant prays that plaintiff's petition be dismissed at its costs; and this defendant prays for general relief and all necessary orders in the premises.

J. WARD GURLEY, JR.,
Att'y for Def't Gomila.

17 *Exception and Answer of Recorder of Mortgages. Filed May 12th*, 1885.

STATE OF LOUISIANA:

United States Circuit Court for the East. Dist. of La., — Division.

THE RIO GRANDE RAILROAD COMPANY
vs.
A. J. GOMILA and THE RECORDER OF MORTGAGES. } No. 11013.

Now into this honorable court comes the recorder of mortgages in and for the parish of Orleans and excepts to the proceedings herein served upon him because the proper and legal service thereof has not been made upon said parties, and he prays the same be dismissed with costs.

And if the aforesaid exceptions be overruled, and not otherwise then said recorder as aforesaid, for answer thereto, pleads general denial of all the allegations therein contained and calls for strict

proof, and he alleges that as a ministerial officer he cannot in any event be held liable for the costs of the proceedings, and prays that same be dismissed with costs, or that the court will make such order and decree as will accord with right and law and be protective to respondent, and he prays for general and equitable relief.

E. K. SKINNER,
Attorney for Recorder of Mortgages.

18 *Bill in Equity. Filed May 14th*, 1885.

To the Circuit Court of the United States for the 5th Circuit and East. Dist. of Louisiana.

THE RIO GRANDE RAILROAD COMPANY
vs.
A. J. GOMILA and THE RECORDER OF MORTGAGES. } No. 11013.

In equity.

The bill of complaint of the Rio Grande Railroad Company, a corporation established and created under the laws of the State of Texas, a citizen of the State of Texas, now filed in this cause, removed from the civil district court for the parish of Orleans in order to reframe the pleadings anew so as to conform to the equity proceedings of this court, shows—

1st. That on the 5th January, 1885, judgment was rendered by the United States circuit court for the 5th circuit and eastern district of Louisiana in favor of your petitioner and against Gomila & Co. and Anthony J. Gomila and Larned Torrey *in solido* for $26,731.97 (twenty-six thousand seven hundred and thirty-one dollars and 97 cents), with interest, at 5 per cent. per annum, from 1st January, 1884, until paid, for a debt due your petitioner before the 8th Feb'y, 1884.

2nd. That on the 17th January, 1885, your petitioners recorded said judgment in the mortgage office for the parish of Orleans, in Book 275, folio 172, and the same became a judicial mortgage on all the immovable property of Gomila & Co., Anthony J. Gomila & Larned Torrey, in the parish of Orleans.

19 3rd. That at the time said judgment was recorded as aforesaid and now Anthony J. Gomila was the owner of a certain portion of ground situated in the 6th district of this city, in the square bounded by Nyades or St. Charles street, Edward or Calhoun, and St. Patrick streets and Henry Clay avenue, designated by the letter A on a sketch made by J. A. D'Dehemecourt, deputy city surveyor, on the 9th July, 1872, annexed for reference to an act of sale by D. A. Barthe to Mrs. Robert O. Butler, passed in the office of James Fahey, a notary public in this city, on the 26th October, 1872, according to which sketch said portion of ground measures, in American measure, 169 feet front on Nayades street, 366 feet 5 inches 4 lines in depth and front on Henry Clay avenue, 325 feet 9 inches 1 line in depth on the line which divided it from the portion

of ground designated by the letter B on said sketch, and said portion A forms the corner of St. Charles street and Henry Clay avenue, and said above-described property, A & B, forms the whole of the certain square of ground which is designated by the No. 90 on a plan drawn by Minizzer, surveyor, the 24th January, 1854, deposited for reference in the office of Achille Chiappella, late a notary public in this city, and the portion marked A forms the half towards Henry Clay avenue of the above square No. 90, together with the buildings and improvements thereon, acquired by Anthony J. Gomila from the Hibernian Insurance Company on Feb'y 8th, 1884.

4th. That there is inscribed in the books of the recorder of mortgages for the parish of Orleans against the name of Anthony J. Gomila and against said property an inscription of a mort-
20 gage made by Anthony J. Gomila in favor of the commercial firm of Gomila and Co. by act before Samuel Flower, a notary public, dated 8th Feb'y, 1884, to secure the sum of $18,000.

Your petitioner shows that by said act the said A. J. Gomila acknowledged to owe to the firm of Gomila & Co. the said sum of $18,000, loaned and advanced to him on the 8th Feb'y, 1884, and for said $18,000 made his four several promissory notes, made by him and to the order of and endorsed by himself, three for $5,000 each and one for $3,000, the three notes for $5,000 each payable in 1, 2, & 3 years after date, respectively, and the $3,000 note payable three years after date.

5th. Your petitioner shows that by virtue of an *alias* writ of execution issued in their favor on their aforesaid judgment they caused the marshal of the United States for the 5th circuit court and east. district of Louisiana to seize the aforesaid described property of Anthony J. Gomila; that the seizure and sale of saidproperty are obstructed and prevented by the aforesaid inscription of mortgage.

Now, your petitioners allege that said mortgage is fictitious and is a fraud committed by said A. J. Gomila to cover his property and to prevent the seizure and sale thereof; that it is not true, as stated in said act of mortgage, that on the 8th Feb'y, 1884, the said firm of Gomila & Co. loaned and advanced to A. J. Gomila the sum of $18,000 or any other sum of money; and your petitioners allege that — reason of said fraud the aforesaid notes, amounting in all to $18,000, are null and void; that after they were made and
21 received by Larned Torrey, who accepted the act of mortgage, they were surrendered to A. J. Gomila, and thereby were cancelled, and they have been ever since in his custody and control — of some confederate, whom, when discovered, your petitioners pray leave to make a party hereto.

Your petitioners show that they fear that the said Anthony J. Gomila will, during the pendency of this suit, part with and dispose of said promissory notes during the pendency of this suit; that said Anthony J. Gomila and Larned Torrey and John J. O'Brien, recorder of mortgages for the parish of Orleans, are all residents of the city of New Orleans and citizens of the State of Louisiana.

The premises considered, your orator and complainant prays leave

to file this bill of complaint to conform to the equity proceedings of this court; that this cause be put on the equity side of the court; that the preliminary injunction issued by the State court be continued in force, and for judgment as prayed for in the original petition cancelling and annulling and erasing from the books of the mortgage office of the parish of Orleans, State of Louisiana, the mortgage granted by Anthony James Gomila in favor of Gomila & Co., composed of said A. J. Gomila and Larned Torrey, per act before Samuel Flower, notary public, dated Feb'y 8th, 1884, to secure the sum of $18,000 (eighteen thousand dollars), and recorded in Book 273, fo. 353, on Feb'y 18th, 1884; that the preliminary injunction be made perpetual, and that the said Anthony J. Gomila be ordered to surrender the aforesaid promissory notes.

22 And that your orator may have such further and other relief in the premises as the nature of this case shall require and as to the court shall seem meet.

GEO. L. BRIGHT,
Solicitor for Complainants.

Order.

Let this bill of complaint be filed as prayed for. Let this cause be put on the equity side of the court. Let the preliminary injunction issued by the State court be continued in force as prayed for.

New Orleans, May 14th, 1885.

DON A. PARDEE, *Judge.*

23 *Replication. Filed May 14th, 1885.*

United States Circuit —, 5th Circuit and East. Dist. of La.

RIO GRANDE RAILROAD COMPANY
vs.
A. J. GOMILA *et al.* } 11013.

The replication of the Rio Grande Railroad Company to the answer of A. J. Gomila, defendant.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without that, that any other matter or thing in the said answer contained materially or effectually in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as the hon.

court shall direct, and humbly pray as in and by their said bill they have already prayed.

GEO. L. BRIGGT,
Solicitor for Complainants.

24 *Amended & Sup. Bill. Filed May 15th,* 1885.

To the United States Circuit Court for the East. Dist. and 5th Circuit of Louisiana.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et al.* } No. 11013.

The supplemental and amended bill of complaint of the Rio Grande Railroad Company shows that the defendant, A. J. Gomila, has put in his answer to the petition filed in the State court and to the bill of complaint herein; that complainants have replied thereto; that said A. J. Gomila has failed and neglected in his answer to state to whom he delivered the notes the subject of this suit; that it is necessary, in order that complainants may have the remedy prayed for by them, that the name of the person to whom they were delivered, if they were so delivered, and the name of the person now in possession thereof should be disclosed in order that he be made a party defendant herein.

Wherefore complainants pray leave to withdraw their replication and to amend their bill by filing this amended and supplemental bill, and that Anthony J. Gomila be ordered to answer under oath and within a time to be fixed by the court the annexed interrogations, and for general relief.

GEO. L. BRIGHT,
Att'y for Solicitor.

Interrogations to Anthony J. Gomila.

To whom did you deliver the notes described in the original
25 bill on file, and when did you do so? Give his full name and address.

In whose possession have said notes been at all and at any time up to the present time? Who is now the holder of said notes? Give his name and address.

Affidavit.

Chas. Maduell, sworn, says he is the duly authorized agent of the complainants, who reside out of the jurisdiction of this court; that this application to file this supplemental and amended bill is not made for the purpose of vexation or delay.

CHAS. MADUELL,

Sworn to and subscribed before me, notary, at New Orleans, La., this May 15th, 1885.

[SEAL.] ANDREW HERO, JR., *Not. Pub.*

Order.

Let the complainants have leave to withdraw their application. Let this amended and supplemental bill be filed, and let the defendant, A. J. Gomila, answer under oath and within the rule day, after the service on him of this supplemental and amended bill, the interrogatories thereto annexed.

New Orleans, May 15th, 1883.

DON A. PARDEE, *Judge.*

Received May 15th, 1885, by the U. S. marshal, and on the 16th day of May, 1885, served a true copy of the within supplemental and amended bill on A. J. Gomila by handing the same to him in person.

J. R. G. PITKIN, *U. S. Marshal,*
By JNO. H. SIMONDS, *Deputy.*

26 *Answers of A. J. Gomila to Interrog. Propounded, &c. Filed June 1st, 1885.*

Circuit Court of the U. S. for the 5th Cir. & East. Dist of La.

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et als.*
} No. 11013.

Answers of A. J. Gomila to the interrogatories propounded to him herein by the amended and supplemental bill of complaint, filed May 15th, 1885.

To the first of said interrogatories, which reads as follows, viz:

"To whom did you deliver the notes described in the original bill on file, and when did you do so? Give his full name and address."

He answers, viz:

Ans. The notes were all delivered to Larned Torrey, the other member of the firm of Gomila & Co., when they were made or executed, Feb'y 8th, 1884.

To the second of said interrogatories, which reads as follows, viz:

"In whose possession have said notes been at all and any time up to the present time?"

He answers, viz:

Ans. The said notes were immediately thereafter delivered to J. Ward Gurley, Jr., of this city, from whom Gomila & Co. received the following sums of cash, viz., on 6th, Feb'y, 1884, ($3,496.50) three thousand four hundred and ninety-six and $\frac{50}{100}$ dollars;

27 on Feb'y 11th, 1884, ($1,498.50) one thousand four hundred and ninety-eight and $\frac{50}{100}$ dollars; on 20th Feb'y, 1884, ($1,000) one thousand dollars, besides some city bonds at various dates just before and subsequently, other small sums of money for costs in different suits, etc., all of which is still due said Gurley, with interest thereon; that $5,000 of said sums of money was obtained from said

Gurley for the purpose and used to pay the balance of the purchase price of the property in question to the Hibernia Ins. Co.

That some months after the said notes were so delivered to said Gurley two of them—viz., the note for $5,000, due in 2 years after its date, and the note for $5,000, due in 3 years after date—were withdrawn from the said Gurley by Gomila & Co., through the said Torrey, and pledged on the 21st Aug., 1884, with and to the Teutonia Ins. Co. of this city to secure a loan then made by said ins. Co. to Gomila & Co. of $5,000 in cash; that on the 3rd Sept., 1884, the said loan was renewed with said ins. Co., and on the 10 Oct., 1884, the said loan of $5,000 was renewed in the State Nat'l Bank of this city, and said two mortgage notes were withdrawn by Gomila & Co., through the said Torrey, from said ins. Co. and pledged with and to the said State Nat'l Bank to secure said loan.

Subsequently Gomila & Co., through said Torrey, withdrew said two notes from the State Nat'l Bank and placed them with C. D. Barker, of this city, on or about 3rd November, 1884, from whom said firm of Gomila and Co. received, through said Torrey, the sum of two thousand dollars in cash November 3rd, 1884, and the additional sum of one thousand dollars in cash Nov. 5th, 1884,
28 and the additional sum of one thousand dollars in cash Nov. 7th, 1884.

And, so far as deponent knows, the said last two mentioned notes are still held by said Barker and the other two notes, one for $5,000, due in one year after its date, and one for $3,000, due in 3 years after its date, are now and have always been held by said Gurley since they were first delivered to him as aforesaid.

To the 3rd of said interrogatories, which reads as follows, viz:

"Who is now the holder of said notes? Give his name and address."

He answered, viz:

Ans. This interrogatory is answered by the answer just given above.

A. J. GOMILA.

Sworn to and subscribed before me this 1st June, 1885.

T. McC. HYMAN, *D'y Cl'k.*

29 *Replication. Filed July 3d*, 1885.

Circuit Court of the U. S. for the East. Dist. and the 5th Circuit of La.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et al.* } No. 11013.

The replication of the Rio Grande R. R. Co. to the answer of A. J. Gomila and Larned Torrey.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to

the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto sayeth that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answers of the said defendants are very uncertain, evasive, and untrue, and insufficient in the law to be replied unto by these repliants, without that, that any other matter or thing in the said answers contained materially or effectually in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this hon. court shall direct, and humbly prays as in and by his [their] said bill they have already prayed.

GEO. L. BRIGHT,
Counsel for Plaintiffs.

30 *Supp. and Amended Bill. Filed July* 28, 1885.

To the Circuit Court of the United States for the 5th Circuit and Eastern District of Louisiana.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et al.*
No. 11013.

In equity.

The supplemental and amended bill of complaint of the Rio Grande Railroad Company, filed with the leave of the court first obtained, shows—

That in their original bill of complaint they charge that the mortgage granted by Anthony J. Gomila to secure certain notes, amounting to $18,000, is fictitious and is a simulation and a fraud committed by said Gomila to cover his property and prevent seizure and sale thereof by his creditors, and especially by your complainants, and that the notes described in the original bill of complaint are in his possession, custody, and control, or in the custody and control of some of his confederates, whom, when discovered, complainants reserve the right to make parties to this suit.

Now, complainants show that it appears by the answers of Gomila that J. Ward Gurley, Jr., a citizen of Louisiana and a resident of New Orleans, and C. D. Barker, also a citizen of Louisiana and a resident of New Orleans, claim to be the owners of the said notes and assert the sufficiency and legality of the mortgage by which they are pretended to be secured.

The premises considered, your orators pray leave to file this amended and supplemental bill of complaint, that J. Ward Gurley, Jr., and C. D. Barker be made defendants.

31 May it please the court to grant unto the plaintiff a writ of subpœna, to be directed to the said J. Ward Gurley, Jr., and C. D. Barker, thereby commanding them and each of them, at a cer-

tain time and under certain penalty therein to be limited, personally to appear before this hon. court and then and there full, true, direct, and perfect answers make to all and singular the premises, the original bill of complaint and this supplemental bill of complaint, and further to stand to and perform and abide such further order, direction, and decree therein as to this honorable court shall seem meet and shall seem agreeable to equity and good conscience; that the said defendants answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the plaintiffs, and for judgment in favor of your orators and against them and the other parties to this suit, cancelling and annulling and erasing from the books of the mortgage office the mortgage granted by Anthony James Gomila in favor of the commercial firm of Gomila & Co., composed of A. J. Gomila and Larned Torrey, per act before Samuel Flower, not pub., dated Feb'y 8th, 1884, to secure the sum of $18,000, and recorded in Book 273, fo. 353, on Feb'y 18th, 1884, and that they be ordered to surrender the aforesaid promissory notes; and your orators pray that they may have such further and other relief in the premises as the nature of their case shall require and as — this honorable court shall seem meet.

GEO. L. BRIGHT, *Solicitor.*

Order.

Let this and amended bill be filed. Let J. Ward Gurley, Jr., and C. D. Barker be made defendants, and process issue, all as prayed for. July 25th, 1885.

DON A. PARDEE, *Judge.*

32 *Demurrer of C. D. Barker. Filed Oct. 5th,* 1885.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

THE RIO GRANDE RAILROAD CO.
vs
A. J. GOMILA *et als.*
No. 11013.

The demurrer of Caleb D. Barker, defendant, to the bill of complaint and supplemental bill of the Rio Grande Railroad Company.

This defendant, by protestation, not confessing all or any of the matters and things in plaintiff's bill of complaint and supplemental bill contained to be true in such manner and form or [as] the same are therein set forth and alleged, to [doth] *the* demurr*er* to said bill and supplemental bill, and for cause or demurrer showeth—

That the plaintiff doth [hath] not in and by its said bill and supplemental bill made and stated such a case as entitled it in a court of equity to any relief against this defendant or to the matters contained in the said bill and supplemental bill or any of such matters.

And for further cause of demurrer this defendant showeth that there are not proper parties to the said bill and supplemental bill, inasmuch as under the allegations of said bill and supplemental bill the firm of A. J. Gomila & Co. or its representatives and Larned Torrey are both necessary parties to the suit.

And for further cause of demurrer this defendant showeth
33 that the said bill and supplemental bill are contradictory and inconsistent in or under, as it is alleged, that the mortgage therein attached is wholly fictitious, and also that the notes were once issued and were returned to the maker, and thereby became cancelled; which last allegation is all allegation; that when originally issued they were valid.

Wherefore, and for divers other good causes of demurrer appearing in the said bill and supplemental bill, this defendant doth demur thereto and humbly demands that [the] judgment of this court whether he shall be compelled to make any other or further answer to said bill and supplemental bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

JONAS & NIXON,
Solicitors for C. D. Barker.

I certify that, in my opinion, the above demurrers are well founded in law.

J. O. NIXON, JR., *Solicitor.*

Caleb D. Barker, being sworn, says that he is a defendant herein, and that the above demurrers are not interposed for delay.

C. D. BARKER.

Sworn to and subscribed before me this fifth day of October, anno Domini 1885, at New Orleans, in said district.

M. M. COHEN,
United States Commissioner for the Fifth Circ't and East. Dist. of La.

34 *Answer of J. Ward Gurley, Jr. Filed Oct. 5, 1885.*

Circuit Court of the United States for the 5th Circuit and Eastern District of La. In Equity.

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et als.*
No. 11013.

The separate answer of J. Ward Gurley, Jr., one of the defendants, to the bill of complaint and supplemental bill of plaintiff.

This defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill and supplemental bill contained, for answer thereto, or to so much thereof as this defendant is advised

it is material or necessary for him to make answer to, answering, saith—

1st. That this defendant admits that plaintiff recovered a judgment against Gomila & Co. as alleged in the 1st article of its bill.

2nd. That this defendant is not advised as to the truth of the allegations of the 2nd article of said bill, and denies the correctness thereof, and denies that the acts alleged, even if done, would produce the legal effect alleged in said bill.

3rd. That this defendant admits and alleges the truth to be that the said A. J. Gomila was, and his estate or succession now is, the owner of the certain property described in the 3rd article
35 of said bill, subject, however, then and now to all legal and just mortgages, liens, and encumbrances thereon.

4th. That this defendant admits the making of the certain mortgage and notes as described in the 4th article of said bill and the inscription of said mortgage in the office of the recorder of mortgages, as alleged in said bill.

5th. That this defendant admits that the plaintiff attempted to seize the said described property, as alleged in the 5th article of said bill; and this defendant avers that the said mortgage and notes were and are true, real, legal, and *bona fide*; that the said mortgage and notes were executed and issued, as aforesaid, for a valuable consideration, in the due course of business, and that the said notes, at least those which this defendant owns, as hereinafter stated, are not now and have not any time since the issuance thereof been in the possession or under the control of the said A. J. Gomila, as alleged in said bill, nor in possession nor under the control of the said Gomila's estate or its representatives; and this defendant specially denies the charge that the said mortgage is fictitious and a fraud committed to cover the said Gomila's property and prevent the seizure and sale thereof; and this defendant avers that the said notes are not, nor are either of them, null and void, nor have any of them been cancelled, as alleged by plaintiff, but that, on the contrary, the notes are still due and unpaid.

36 6th. Further, this defendant, answering the first part of the said supplemental bill, specially denies that the said mortgage is fictitious and a simulation and a fraud committed by said Gomila to cover his property and prevent seizure and sale thereof by his creditors, and especially by said complainant, as is alleged in said bill and supplemental bill; and this defendant also specially denies that the said notes are or were in the possession, custody, or control of said Gomila or some of his confederates, as alleged; and this defendant avers that all and [of] said allegations were and are untrue, and that the truth is as herein stated.

7th. And, further answering the said supplemental bill, this defendant avers that the answers made and filed herein by the said Gomila, and which are referred to in said supplemental bill, are true and correct, and that the said notes are held as stated—at least those stated to be held by this defendant—and that the said mortgage is true, real, legal, and sufficient.

8th. And, further answering, this defendant avers that on the day

said mortgage was made or executed, Feb'y 8th, 1884, or thereabouts all of the said four notes described in said bill were delivered to this defendant by Larned Torrey, a member of the said firm of Gomila & Co.; that part of said notes were then entirely acquired by this defendant in consideration of the money hereinafter stated, which this defendant paid to the said firm of Gomila & Co. in cash,
37 and the rest of said notes were left in possession of this defendant as security for further sums which this defendant expected to advance to said Gomila & Co.; that this defendant paid to and advanced for said Gomila & Co., in consideration of the two of said mortgage notes now held by him and hereinafter more specially designated, the following sums in cash, viz., on 6th Feb'y, 1884, three thousand four hundred and ninety-six and $\frac{50}{100}$ dollars ($3,496.50); on the 11th Feb'y, 1884, ($1,498.50) one thousand four hundred and ninety-eight and $\frac{50}{100}$ dollars; on the 20th Feb'y, 1884, ($1,000) one thousand dollars, besides some New Orleans city bonds, and at various dates just before the date of said mortgage and subsequently, other sums of money for costs in different suits, which, together with interest due on all said sums of money, and the taxes paid by this defendant upon said mortgaged property, and the fees which were due to this defendant by said Gomila & Co. and said Gomila at the time of the execution of said mortgage, and which said mortgage and notes were intended in part to secure, amount in all to more than the amount of the said notes now held and owned by this defendant. Further, this defendant avers that five thousand dollars of said sums of money were advanced by this defendant to enable the said A. J. Gomila to pay the Hibernia Ins. Co. the balance due it for the purchase price of said property; and this defendant is informed and believes that said $5,000 were so paid to the said Hibernia Ins. Co. for said balance of purchase price, and for that portion of his said advances this defendant's claim is in the nature of a vendor's lien, and he has the same rank and privilege
38 upon said property for said sum as a vendor has for the purchase price.

9th. Further answering, this defendant avers that some months after said four mortgages were so delivered to him as aforesaid the said Gomila & Co. applied to this defendant for further advances of money in addition to the sums hereinbefore mentioned, and this defendant being unable to furnish any more money, the said Gomila & Co. requested this defendant to return to them two of said notes, viz., one for $5,000, due in 2 years after its date, and one for $5,000, due in 3 years after its date, in order that they might obtain more money upon said notes from some one else; and this defendant did so return and deliver the said two notes to Gomila & Co. through Larned Torrey, one of the partners; and this defendant retained the other two of said mortgaged notes, viz., one for $5,000, due in one year after its date, and one for $3,000, due in three years after its date; and this defendant is the true, legal, and sole holder and owner of said two last-mentioned notes, and has never parted with them or allowed them to get out of his possession and control since they were first delivered to him, Feb'y 8th, 1884, or thereabouts.

And this defendant avers that said notes were so acquired by him for a valuable and full consideration, as aforesaid, in the due course of business, and that the same were issued in the interest and for the benefit of the said Gomila & Co. and their creditors to enable them to continue business, and no part of this defendant's said advances have ever been returned or paid, and the said notes
39 and the full amount thereof are still justly and truly due this defendant.

10th. Further, this defendant avers that even if the said mortgage was executed and the said notes issued to this defendant for the sole purpose of securing a just debt, although the debtor were [was] insolvent to the knowledge of the creditor with whom he contracted, and although the other creditors are injured thereby, the said mortgage and notes could not be set aside and cancelled because said mortgage and notes were executed and issued and said contract of payment was made more than one year before the bringing of any suit to avoid the same, as provided by article 1987 of the Civil Code of Louisiana; and this defendant avers that, to the extent and for the amount in which said mortgage notes now held and owned by him as aforesaid may be and are in excess of his advances as aforesaid, they were issued and given to him on or about the said 8th day of Feb'y, 1884, to and for the purpose of securing a just debt then due this defendant of a greater amount than said balance or excess of said notes over and above said advances.

And this defendant therefore specially avers and pleads the said article 1987 of the Civil Code of Louisiana in bar to the said bill and supplemental bill relative to and so far as concerned said contract and the said balance or excess of said two mortgaged notes over and above defendant's said cash advances.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill and
40 supplemental bill charged, without this, that there is any other matter, cause, or thing in the said complainant's said bill and supplemental bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

J. WARD GURLEY, JR.,
Def't in Person.

ROUSE & GRANT, *Of Counsel.*

J. Ward Gurley, Jr., being sworn, says that he has read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

J. WARD GURLEY, JR.

Sworn to and subscribed before me this 5th day of October, 1885.

H. J. CARTER,
D'y Clk U. S. Circuit Court, East. Dist. of La.

41 *Bill of Revivor. Filed Oct. 8th, 1885.*

To the — Court of the United States for the 5th Circuit and East. Dist. of Louisiana.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA and Others. } No. 11013.

In chancery.

Your orator, The Rio Grande Railroad Company, shows that on or about the — ———, 1885, your orators filed their bill in this hon. court against A. J. Gomila and others for the purposes in said bill and supplemental bill set forth.

And your orators show that A. J. Gomila, one of the defendants, being duly served with process, appeared to said original and supplemental bills and put in his answer thereto.

And, further, that on or about the — day of Sept., 1885, the said A. J. Gomila, one of the defendants, departed this life, leaving Mrs. Gomila, his widow in community under the laws of Louisiana, and leaving children, the issue of his marriage with said Mrs. Gomila; that by the laws of Louisiana Mrs. Gomila is the natural tutrix of said children, and the said children are the heirs of said A. J. Gomila.

And your petitioners show that the civil district court for the parish of Orleans has appointed P. S. Wiltz, Jr., the public administrator, the dative testamentary executor of the last will and testament of A. G. Gomila, and he has qualified as such, and letters of executorship have been delivered to him.

And your orators further show unto your honor that this suit having became abated, so far as A. J. Gomila is concerned,
42 by the death of said Gomila, your orators are, and they have been advised, entitled to have the suit revived against the said Mrs. Widow Gomila individually, as widow in community and as natural tutrix of her minor children, and against P. S. Wiltz, Jr., the public administrator, who is the dative testamentary executor of the last will and testament of A. J. Gomila, and to have the proceedings had therein prosecuted and carried into effect against the said Widow Gomila individually, as widow in community and as natural tutrix of her minor children, and against P. S. Wiltz, Jr., the public administrator, who is the dative testamentary executor of the last will and testament of said A. J. Gomila, in like manner as they could or might have had if the said A. J. Gomila, defendant, had been still living.

To the end, therefore, that the said Widow Gomila individually, as widow in community and as natural tutrix of her minor children,

and P. S. Wiltz, Jr., public administrator and dative testamentary executor of the last will and testament of A. J. Gomila, may show cause, if they can, why the said suit and proceedings therein should not stand and be revived against them, as the representatives of said late defendant, A. J. Gomila, and be in the same plight and condition as the same were in at the time of the abatement thereof, and that the said suit and proceedings had therein may stand and be revived accordingly—

May it please the court to grant unto your orators the writ of subpœna, as allowed by the 56th rule of equity, issuing out of and under the seal of this hon. court, to be directed to the said Mrs.
43 Widow Gomila individually, as widow in community of A. J. Gomila and as natural tutrix of her minor children, and to P. S. Wiltz, Jr., public administrator and dative testamentary executor of the last will and testament of A. J. Gomila, thereby commanding them and each of them to appear and show cause, if any they have, why the cause should not be revived and the proceeding therein had should not stand and be revived against them and each of them and be in the same plight and condition as the same were at the abatement thereof, and further to stand to and abide such orders and decree in the premises as to this hon. court may seem meet.

And your orators will ever pray.

GEO. L. BRIGHT,
Solicitor for Complainants.

44 *Replication to Answer of J. Ward Gurley, Jr. Filed Oct. 19th, 1885.*

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA and Others. } No. 11013.

United States Circuit Court for the 5th Circuit and Eastern Dist. of Louisiana

These repliants, The Rio Grande Railroad Co., saving and reserving to themselves all and all manner of advantages and exceptions which may be had and taken to the manifold errors and uncertainties and insufficiencies of the answer of the said defendant, J. W. Gurley, Jr., for replication thereunto say that — do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without that, that any other matter or thing in the said answer contained materially or effectually in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and

prove as the honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

GEO. L. BRIGHT,
Solicitor for Complainants.

45 *Supplemental Bill Making the Firm of Gomila & Co. Parties. Filed Oct. 26th, 1885.*

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA and THE RECORDER OF MORTGAGES. } No. 11013.

To the Circuit Court of the United States for the 5th Circuit and Eastern Dist of La.

The supplemental and amended bill of the plaintiffs, filed with the leave of the court first obtained, shows that Caleb D. Barker, one of the defendants, has filed a demurrer pleading that there are not proper parties to the original and supplemental bills herein filed, for the firm of Gomila & Co. and Larned Torrey are necessary parties and have not been made parties.

The plaintiffs show that the firm of Gomila & Co. was composed of A. J. Gomila, who is already a party to this suit, and of Larned Torrey, and that said firm has been long since dissolved.

Now, in order to satisfy the demurrer of said Caleb D. Barker, the plaintiffs pray for leave to file this amended and supplemental bill, that Larned Torrey, a citizen of Louisiana, be made a defendant; and that said Larned Torrey may answer, may it please the court to grant unto the plaintiff a writ of subpœna, to be directed to the said Larned Torrey, thereby commanding him, at a certain time and under certain penalty therein to be limited, personally to

46 appear before this hon. court and then and there full, true, and direct and perfect answers make to all and singular the premises, the original bill of complaint and the supplemental bills of complaint, and further to stand to and perform and abide such further order, direction, and decree therein as to this honorable court shall seem meet and shall seem agreeable to equity and good conscience; that the said Larned Torrey answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the plaintiffs, and for judgment in favor of your orators and plaintiffs and against him and the other parties to this suit, cancelling and annulling and erasing from the books of the mortgage office the mortgage granted by Anthony James Gomila in favor of the commercial firm of Gomila & Co., composed of the said A. J. Gomila and Larned Torrey, per act before Samuel Flower, notary public, dated Feb'y 8th, 1884, to secure the sum of $18,000, and recorded in Book No. 273, fo. 353, on Feb'y 18th, 1884, and that he, individually and as a member of the late firm of Gomila & Co., be ordered to surrender the aforesaid promissory notes; and the plaintiffs pray that they may have such further and other relief in the premises as the nature of their case shall require and as — this hon. court shall seem meet. GEO. L. BRIGHT, *Solicitor.*

Order.

Let the prayer of this bill of complaint be granted as prayed for.

DON A. PARDEE, *Judge.*

October 23, 1885.

47 *App'r'ce of Mrs. Gomila.*

Extract from Chancery Order Book.

RIO GRANDE RAILROAD CO. *vs.* A. J. GOMILA *et al.* } No. 11013.

MONDAY, *November 2nd*, 1885.

And now comes Mrs. Gomila, party defendant herein, through her solicitor, J. Ward Gurly, Jr., and enters her appearance to the bill of revivor herein.

Demurrer of C. D. Barker Overruled.

THE RIO GRANDE RAILROAD CO. *vs.* A. J. GOMILA and THE RECORDER OF MORTGAGES. } No. 11013.

Extract from Minutes.

NEW ORLEANS, SATURDAY, *November 7th*, 1885.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, district judge.

This cause came up to be heard on the demurrer of C. D. Barker to the bill herein, and was argued by the counsel for the parties respectively; whereupon, and upon consideration thereof, it was ordered that the demurrer be overruled, with leave to the defendant to answer on or before the 17th day of November, 1885.

48 *Answer of C. D. Barker. Filed Nov. 17th*, 1885.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

THE RIO GRANDE RAILROAD CO. *versus* A. J. GOMILA *et als.* } In Equity. No. 11013.

The separate answer of Caleb D. Barker, one of the defendants, to the bill of complaint and supplemental bill of complaint of plaintiff.

This defendant, now and at all times saving and reserving to himself all benefit and advantage of exception which can or may be had

or taken to the many errors, uncertainties, and other imperfections in said complainant's said bill of complaint and supplemental bill of complaint, for answer thereto, or unto so much thereof as this defendant is advised is material or necessary for him to make answer unto, this defendant, for answer, saith—

First. That this defendant is not advised as to the truth of the allegations in the first article of plaintiff's bill or as to the validity of the judgment therein set out.

Second. That this defendant is not advised as to the truth of the allegations of the second article of the said bill, and denies the allegations thereof, and denies that the acts alleged, even if done, would produce the legal effect alleged in said bill.

Third. This defendant alleges the truth to be that the real property described in the third article of plaintiff's bill belonged to A. J. Gomila, and did belong to him previous to the execution of
49 the mortgage hereinafter described, and now belongs to the succession of the said A. J. Gomila, subject, however, then and now to the mortgage held by this defendant, as hereinafter set out.

Fourth. This defendant admits that there is a mortgage inscribed in the books of the recorder of mortgages for the parish of Orleans—a certain mortgage for the sum of eighteen thousand dollars, as described in the fourth article of plaintiff's bill.

Fifth. This defendant is not advised as — the truth of the allegations in the fifth article of plaintiff's bill regarding the issuance of the writ of execution out of this court, and your defendant denies the allegations contained in the said fifth article, to the effect that the said mortgage above described is fictitious, or is a fraud committed by said Gomila to cover his property, and denies that the notes herein described and the mortgage security is null and void, and denies that they were surrendered by Larned Torrey to A. J. Gomila, and were thereby cancelled, and denies that they have ever since been in the custody and control of the said A. J. Gomila or of some of — confederates; and defendant avers that the said mortgage was made for the sum of eighteen thousand dollars, which was represented by four notes, to wit:

Three notes each for five thousand dollars and one note for three thousand dollars; that, as far as concerns one of the notes for five thousand dollars and the note for three thousand dollars, defendant is not advised as to the disposition thereof made by A. J. Gomila & Co. or by Larned Torrey; but, as far as the two notes each for five thousand dollars, due, one in two years after date and one in
50 three years after date, defendant avers the truth to be that on or about the 6th Nov., 1884, the said two notes were pledged and deposited with this defendant by Larned Torrey to secure a loan made on that date in cash for the sum of two thousand dollars, which sum in cash was paid to the said Larned Torrey, at that time a member of the firm of A. J. Gomila & Co.; that subsequently, to wit, on the 10th Nov., 1884, this defendant loaned the said Torrey one thousand dollars more in cash, and on the 13th Nov., 1884, this defendant loaned the said Torrey one thousand dollars in cash; the repayment of all of which sums were, by agreement

at that time, to be secured by the pledge of the said two above-described notes, and that the above-described notes have been, ever since 6th Nov., 1884, in the actual possession of this defendant, except at one time, for a few hours, on a day in the month of Nov. or Dec., 1884, when they were placed in the possession of said Torrey, as agent of this defendant, for the purpose of endeavoring to secure an advance upon them for the purpose of repaying this defendant.

That the said efforts were unsuccessful and the said notes were immediately returned to this defendant and have been in his possession ever since; that the said Torrey, finding that he was unable to negotiate the said notes elsewhere and unable to raise the loan upon them, for the purpose of repaying this defendant, agreed with this defendant that if the said loan was not repaid on or before the 1st of January, 1885, the notes should become the property of this defendant, and the said loan was not repaid on or before the 1st

51 January, 1885, or any portion thereof, and has not been repaid at any time since, or any portion thereof, and the said notes are now the property of defendant.

This defendant further avers that the said notes were negotiable paper; that this defendant took them before maturity, *bona fide*, for a valuable consideration, in due course of business, without any intention to defraud the creditors of the said Torrey or of the said Gomila & Co.

This defendant avers that the consideration paid for the said notes was only a fair consideration, as there was a concurrent mortgage on the property for eight thousand dollars, and the property was not, in the opinion of this defendant, worth that sum of money, and this defendant did not believe that upon the sale of the said property more can be realized than enough to pay this defendant, as the holder of the said mortgage notes, considering the existence of a concurrent mortgage more than the said amount of four thousand dollars, with interest, costs, and expenses to which this defendant has been and will be put.

Sixth. This defendant avers that in the said transaction with Larned Torrey he does not know whether the said Torrey was acting for himself or for the firm of Gomila & Co., but that the said Torrey had the possession of the said mortgage notes, which were negotiable paper, and that the four thousand dollars above set forth were advanced and loaned by this defendant, as above set forth, upon the faith and security of the said mortgage notes.

And that defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill and supplemental bill charged, with- this, that there is any other

52 matter, cause, or thing in the complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be

hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

C. D. BARKER.

JONAS & NIXON,
Solicitors for Def't.

Caleb D. Barker, being sworn, says that he has read the above answer subscribed by him; that he is the defendant therein named; that he has read the same and knows its contents, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

C. D. BARKER.

Appearance of Larned Torrey.

RIO GRANDE R. R. Co.
vs.
GOMILA & Co. } No. 11013.

WEDNESDAY, *Dec. 9th*, 1885.

And now comes Larned Torrey, one of the defendants herein, and enters his appearance to the complainant's bill of complaint and supplemental bill.

53 *Order for Production of Books of the Late Firm of Gomila & Co. Entered & Filed Dec.* 22, 1885.

United States Circuit Court, 5th Circuit and East. District of Louisiana.

THE RIO GRANDE RAILROAD Co.
vs.
A. J. GOMILA *et als.* } No. 11013.

On motion of Geo. L. Bright, solicitor for the complainant, it is ordered by the court that the defendant, Larned Torrey, produce and deposit with the clerk of this court, Edward R. Hunt, who is also the examiner appointed herein to take testimony, all the commercial books of the late firm of A. J. Gomila & Co. used by said firm from and after the first day of January, 1884, to the present time, and especially the bills receivable book, the bills payable book, the cash book, the journal, the day book, the ledger, and all check books with any and all banks; that he leave them with the said examiner until the further order of the court; that the plaintiffs, their solicitors and agents, be at liberty to inspect them and take copies from them; and it is ordered that said Larned Torrey do produce said books within 24 hours after the service of this order, and that he make a full and sufficient affidavit whether he has or has not said books in his possession, and accounting for the same.

Charles Maduell, being sworn, says he is the duly authorized agent of the complainants; that the books of A. J. Gomila and Co. mentioned in the foregoing motion are relevant and material to the cause of the complainants and are necessary to the question to be decided.

CHAS. MADUELL.

Sworn to and subscribed before me this 22nd day of Dec., 54 1885.

[SEAL.] EDWARD J. BLANCHARD, *Not. Pub.*

Marshal's Return.

Received Dec. 23rd, 1885, by the U. S. marshal, and on the 23rd day of December, 1885, I served a true copy of the within motion and order on Larned Torrey by leaving same at his domicil, No. 1579 St. Charles street, in the hands of Lizzie Smith, a person over 14 years of age, he, Larned Torrey, being absent at the time of service.

Returned the same day.

R. B. PLEASANTS,
U. S. Marshal,
By WM. B. LOGAN,
D'y U. S. Marshal.

Order Vacating.

Extract from Minutes.

NEW ORLEANS. SATURDAY, *Dec. 26th*, 1885.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, district judge.

RIO GRANDE RAILROAD CO. *vs.* A. J. GOMILA & CO. } No. 11013.

This day, on oral motion of Mr. Wm. Grant, counsel for J. Ward Gurly, Jr., the court orders that the order made on the 22nd December, 1885, directing Larned Torrey to produce certain books, be vacated as having been improvidently granted, so far as to order the Rio Grande Railroad Co. to take rule on the said Torrey to show cause why the order should not be made.

Order to Show Cause.

U. S. C't C't.

THE RIO GRANDE RAILROAD CO. *vs.* A. J. GOMILA & CO. } No. 11013.

On motion of Geo. L. Bright, solicitor for the plaintiffs, the court having ordered the suspension of the order herein made on the 22nd Dec., 1885, ordering Larned Torrey to produce certain books, and

that the plaintiffs take a rule on him to show cause why said order should not be granted, it is now ordered that the said Larned
55 Torrey show cause on Monday, 28th Dec., 1885, why said order as made on Dec. 22 should not be made.

Order to Produce Books. Ent'd & Filed Dec. 28th, 1885.

RIO GRANDE RAILROAD CO. *vs.* A. J. GOMILA *et als.* } No. 11013.

The rule taken by the plaintiffs on Larned Torrey on the 24th Dec., 1885, came on for trial this day.

Present: G. L. Bright, counsel for plaintiff; Rouse and Grant, for Larned Torrey.

After hearing the parties, it is ordered that Larned Torrey produce and deposit with E. R. Hunt, appointed herein examiner, all the commercial books of the late firm of A. J. Gomila and Co. used by said firm from and after the 1st Jan., 1884, to the present time, and especially the bills receivable and payable book, the cash book, the journal, the day book, the ledger, and all check books with any and all banks; that he leave them with said examiner until the further order of the court; that the solicitors and agents of the plaintiffs be at liberty to inspect them and take copies from them.

And it is ordered that the said Torrey produce and deposit said books within 24 hours from service hereof, and that he make a full and sufficient affidavit whether he has deposited all the books which he is ordered to produce and which are in his possession or under his control.

It is not intended by this order that any examination or inspection of the books when produced shall be made by anybody present beyond that which is necessary to enable the examiner to
56 verify the statement of such witnesses as may be examined with reference to the items or statements in the books relating to the subject-matters of the suit in which the testimony is to be used; nor is it intended that the books shall be left with the examiner from day to day, but that they shall be after each examination in the possession of defendant or counsel for defendant; that the books shall be examined only in the presence of the parties or attorneys.

Dec. 28th, 1885.

(Signed) ALECK BOARMAN, *Judge.*

Marshal's Return.

Received Dec. 28, 1885, by the U. S. marshal, and on the same day, month, and year I served a true copy of the within decree and order upon Rouse & Grant by handing same to Mr. Grant in person, and upon G. L. Bright by handing the same to him in person.

R. B. PLEASANTS,
U. S. Marshal,
By J. WOOD COLEMAN,
Dep'ty U. S. M.

57 *Return of L. Torrey to Order to Produce Books. Filed January 2, 1886.*

U. S. Cir. Court.

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et als.* } No. 11013.

Now comes Larned Torrey and, for return to the order herein served on him requiring the production of certain books, says that in obedience to and according to said order he now produces the following books of said late firm of Gomila & Co., viz:

One cash book.
One journal.
One ledger.
Three check books—two on the Union Nat'l Bank and one on the State Nat'l Bank.
One bills receivable book.
One bills payable book.

And, further, this respondent returns and says that the above-described books are all the books which he has or knows of included in the terms of said order, except a day book or blotter, which respondent can't find, the contents of which are in the journal produced.

LARNED TORREY.

Subscribed and sworn — before me Jan. 2nd, 1886.

E. R. HUNT,
Commissioner U. S. Cir't Court, East. Dist. of La.

58 *Pro Confesso as to Larned Torrey.*

Extract from Chancery Order Book, Jan'y 27th, 1886.

RIO GRANDE RAILROAD CO.
vs.
GOMILA *et al.* } No. 11013.

On motion of Geo. L. Bright, solicitor for the complainants herein, and it appearing that Larned Torrey, one of the defendants herein, has been duly served with process of subpœna and entered appearance by solicitor, and that he has failed to demur, answer, or plead to the bill of complaint within the time required by law, it is ordered that said bill, as to the matters and things therein contained, charged, and set forth, be, and the same is hereby, taken as confessed against the said Larned Torrey, defendant.

Motion and Order for Publication, &c.

Extract from the Minutes, November Term, 1885.

NEW ORLEANS, MONDAY, *February* 22, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

RIO GRANDE R. R. Co.
vs.
A. J. GOMILA & Co. *et al.* } No. 11013.

On motion of Rouse & Grant and Jonas & Nixon, solicitors for defendants, and suggesting that the delays for taking evidence have elapsed, it is ordered that publication of testimony do now pass, and that the cause be assigned for hearing on the 12th day of March, 1886, at 11 a. m., and that complainant's counsel be notified.

59 *Order to Geo. C. Layfaye to Produce Copy of Bank Account. Entered & Filed Feb'y 23rd,* 1886.

U. S. Circuit Court.

THE RIO GRANDE RAILROAD CO.
vs.
GOMILA *et al.* } No. 11013.

In equity.

On motion of Geo. L. Bright, solicitor for the plaintiffs, it is ordered that George C. Layfaye, book-keeper for the Louisiana National Bank, do produce before the examiner in this cause, on Saturday, 27th Feb'y, 1886, at 11 a. m., a true and correct copy of the account of deposits made and checks drawn by C. D. Barker from the 1st day of October, 1884, to the present time, and showing what balance, if any, the said Barker had to his credit on 1st October, 1884, and 1st November, 1884.

Marshal's Return.

Received Feb. 24th, 1886, by the U. S. marshal, and on the 24th day of Feb., 1886, I served a true copy of the within order to produce copy of bank account on Geo. C. Lafaye by handing the same to him in person.

R. B. PLEASANTS,
U. S. Marshal, East. Dist. of La.
JNO. BAKER,
Deputy U. S. Marshal.

60 *Order to C. D. Barker to Produce, &c. Ent'd & Filed Feb'y 23d, 1886.*

U. S. Circuit Court.

THE RIO GRANDE RAILROAD CO.
vs.
GOMILA *et al.*
} No. 11013.

On motion of Geo. L. Bright, solicitor for the plaintiffs, it is ordered that Caleb D. Barker, one of the defendants, produce before the examiner in this cause, on Saturday, 27th Feb'y, 1886, at 12 o'clock m., his bank book with the Louisiana National Bank, and especially the book in which were entered the deposits made by him in October and November, 1884; and also his check book with the said bank from October and November, 1884.

And it is ordered that these books remain with the examiner until the following Monday, at 12 m.

Marshal's Return.

Received Feb. 24th, 1886, by the U. S. marshal, and on the 24th day of Feb., 1886, I served a true copy of the within order to produce on Caleb D. Barker by leaving the same at his domicil, 193 Thalia St., in hands of Kate Linagan, servant for said party; Mr. Barker absent at service.

R. B. PLEASANTS,
U. S. Marshal.
JNO. BAKER,
Dep'ty U. S. Marshal.

61 *Continuance.*

Extract from Minutes.

NEW ORLEANS, FRIDAY, *April 16th*, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et al.*
} No. 11013.

This cause came on at this term to be heard on the bill, the supplemental bills, the answer, replications, and other proceedings in the cause.

Whereupon the complainant offered the following evidence in support of its bill, to wit:

1. Testimony of Larned Torrey, Exhibit A.
2. " A. P. Noll.
3. " Thomas P. Rouche.
4. " Chas. Maduell.
5. " Louis M. Avendano.

6. Petition of Rio Grande Railroad Company *v.* Gomila & Co. and the ac. annexed to it, filed July 1st, 1884, in the suit No. 10628 of this court.

Marshal's return of service of the petition and citation on Gomila & Co. and on A. J. Gomila and Larned Torrey, and the judgment rendered in the same suit on 5th Jan., 1885; also the exception filed in the suit on Oct. 22nd, 1884, and the answer, filed on 17th Nov., 1884.

And the plaintiffs offer and file in evidence—

7. The mortgage certificate, dated Jan'y 20th, 1885, marked Plaintiffs' Exhibit B.

62 8th. The deed of sale to Gomila, dated 7th Feb'y, 1884, marked Plaintiffs' Exhibit C.

9. The act of mortgage made by A. J. Gomila to Gomila & Co., dated Feb'y 8th, marked Exhibit D.

10. The writ of execution, issued on the 22nd Jan'y, 1885, and the return of the marshal thereon, in suit 10628.

11. The *alias* writ of execution, issued in the same suit on April 8th, 1885, and the return of the marshal thereon.

12. Letter of Gomila & Co. to A. Wessbriski, president of the Rio Grande Railroad Co., dated 9th June, 1881, now marked Exhibit E.

13. Protests of drafts, marked Exhibits T & G, H, N, & I.

14. Testimony of Larned Torrey, taken Jan. 16th, 1885.

17. Testimony of Larned Torrey, taken Jan. 23, 1886.

18. Petition of Mrs. B. H. Bullitt against P. S. Wiltz, Jr., No. 11210 of the docket of this court.

20. Transcript from circuit court, city of St. Louis, suit Breedlove Smith *vs.* Gomila & Torrey, marked Exhibit Z.

21. The check book — C. D. Barker, marked L.

22. Copy of the bank account of C. D. Barker with the La. State Bank, furnished by Geo. C. Lafaye and marked Exhibit X, Y, Z.

23. The 3rd opposition of J. Ward Gurley, Jr., filed in the suit of The Rio Grande Railroad Co. the [*vs.*] Gomila & Co., No. 10628 of the docket of this court.

24. The bank book of C. D. Barker with La. State Nat'l Bank, marked Exhibit L.

25. The testimony of Owen Gernon.

63 26. Proceedings before the examiner of Feb'y 27th, 1885, wherein C. D. Barker produced the bank book L, and wherein Geo. C. Lafaye produced account marked X, Y, Z.

And the defendants offered the following evidence in support of their answer, viz:

1. Evidence and deposition of Caleb D. Barker and exhibits.
2. Documents X, Y, Z, filed 27th Feb'y, 1886.
3. Deposition of J. Ward Gurley, Jr., and exhibits.
4. " " G. C. Lafaye.

And the cause was partially argued by the counsel for the complainants, and was continued for further hearing until to-morrow, at 12 m.

COMPLAINANT'S EVIDENCE.

64 *Testimony of Larned Torry for Plaintiff.*

United States Circuit Court, Eastern District of Louisiana, Fifth Judicial Circuit.

THE RIO GRANDE RAILWAY CO.
vs.
A. J. GOMILA *et als.*
} No. 11013.

Testimony taken in the office of the clerk of the circuit court of the United States, eastern district of La., before the Honl. E. R. Hunt, examiner, Saturday, December 5th, 1885.

Appearances: George L. Bright, Esq., for plaintiff; J. O. Nixon, Jr., Esq., for C. A. Barker; Wm. Grant, Esq., for J. W. Gurley, Jr.

Testimony of Larned Torry.

LANED TORREY, Esqr., sworn and examined, says:

By Mr. BRIGHT:

65 Q. Are you any relation to A. J. Gomilla?
A. Yes, sir; brother-in-law.
Q. Are you any relation to J. Ward Gurley, Jr.?
A. Yes, sir; brother-in-law.
Q. Are you any relation to Mr. Barker?
A. No, sir.
Q. What business relations have you had with Mr. Barker?
A. He has done business with the firm of Gomilla & Co., of which I was a member, for several years.
Q. He has done business with Gomilla & Co.?
A. Yes, sir.
Q. What business?
A. Commission business—buying and selling grain for us.
Q. Broker?
A. Yes, sir.
Q. For what length of time?
A. Ever since there was a firm existing, I think.
Q. From what time to what time?
A. From 1882–1885.
Q. Who composed the firm of Gomilla & Co.?
A. A. J. Gomilla and myself.
Q. When was that firm formed?
A. I think, in the latter part of 1881.
Q. And it lasted to what time?
A. To the beginning of 1885.
66 Q. When did it become insolvent and unable to meet its obligations?
A. About the middle of 1884, I think.
Q. Be sure of that; give us the exact date.

A. I don't know the exact date.

Q. Was it not before February, 1884, that they failed to meet their obligations?

A. Some of its obligations; yes, sir.

Q. Was it not in the commercial world reputed to have failed in February, 1884?

A. Well, about that time, I think.

Q. Had it not for a good while before that failed to pay the debt of the Rio Grande Railway Company?

A. Not for a good while. I think that the drafts were presented in December, 1883; that's my recollection of it. I am not positive about it.

Q. Did they not go to protest on those drafts?

A. Yes, sir.

Q. They were unable to pay the drafts?

A. Gomilla & Co. did not go to protest.

Q. But they were unable to pay the drafts?

A. Yes, sir.

Q. What was your interest in the firm of Gomilla & Co.?

A. Twenty-five per cent. of the net earnings.

Q. Did you put any capital in it?

A. Not a dollar.

67 Q. Were you indebted to the firm at the end of the partnership?

A. Yes, sir.

Q. Who was the book-keeper of that firm?

A. Mr. Lazurtegue at one time and Mr. Leon Labatt at another.

Q. Who was the first book-keeper?

A. Mr. Lazurtegue.

Q. Who succeeded him?

A. Labatt.

Q. Were they the only two book-keepers?

A. Yes, sir. I don't know but what I kept the books for a short time during the existence of the firm.

Q. Did Gomilla & Co. keep a regular set of books?

A. Yes, sir.

Q. Where are those books now?

A. They are in my possession.

Q. At what place?

A. 63 Magazine street.

Q. What books did they keep?

A. A regular set of books.

Q. Please name them.

A. Cash book, journal, ledger.

Q. Check book?

A. Check books.

Q. On what banks?

A. Union and State National.

Q. Up to what time were those books kept?

68 A. I cannot say.

Q. They will show for themselves?

A. Yes, sir; up to a short time before the dissolution.

Q. Who did the other three-quarters of the firm of Gomilla & Co. belong to?

A. Mr. Gomilla.

Q. You know that Mr. Gomilla made a mortgage in favor of Gomilla & Co., before Flower, notary public, for eighteen thousand dollars?

A. Yes, sir.

Q. You accepted the mortgage?

A. Yes sir.

Q. Did you receive the notes?

A. Yes, sir.

Q. From whom?

A. I received them from Mr. Gomilla.

Q. When did he give them to you?

A. I think it was in February, 1884.

Q. At what place?

A. At the office, I think.

Q. What office?

A. Our office.

Q. That — your business office?

A. Yes, sir.

Q. Did he bring them to you there?

A. Yes, sir.

69 Q. What did you do with them? Where did you put them the very moment that he gave them to you?

A. I placed them in the hands of Mr. Gurley, I think.

Q. Before that did you put them in any place in the office?

A. I don't know.

Q. Tell us exactly now what did you do with these notes when you rec'd them?

A. I placed them in the hands of Mr. Gurley—borrowed money on them—gave them to him as collateral.

Q. Go on and tell us how much you borrowed on them.

A. On February 6th I borrowed ($3,496.50) thirty-four hundred and ninety-six & $\frac{50}{100}$ dollars; February 11th, ($1,498.50) fourteen hundred and ninety-eight & $\frac{50}{100}$ dollars; May 20th, ($1,000.00) one thousand dollars. I wanted some more and Mr. Gurley could not give it to me, and I took the two last notes and I borrowed some money on them by placing them in the Teutonia Insurance Company. August 21st, 1884, I withdrew them from the Teutonia Insurance Company and placed them in the State National Bank, and also borrowed money on them there. I withdrew them from the State National Bank in November some time—I have'nt got the exact date—and placed them with Mr. Barker, and borrowed four thousand dollars from him on them. Two of the notes, one of five thousand and one of three thousand dollars, I believe, are in the hands of Mr. Gurley at present, and the other two, of five thousand each, are in the hands of Mr. Barker, as far as I know.

70 Q. Who delivered the notes to Gurley?

A. I did.

Q. How many of them did you deliver?
A. Four; three of five thousand each and one of three thousand.
Q. Did you deliver them all at the same time?
A. Yes, sir.
Q. Did he give you the money at the time that you delivered them to him?
A. He gave me $3,496.50 on the 6th of February, and he gave me $1,498.50 on the 11th, and $1,000.00 on the 20th May.
Q. When he gave you this money you delivered him the notes?
A. Yes, sir.
Q. Did you sign any pledge to him of those notes at that time?
A. No, sir; I think not.
Q. State the conversation that you had with him at the time.
A. I don't remember it.
Q. What did you tell him that you gave him the notes for?
A. Because I wanted to borrow some money on them.
Q. Did you apply to him to lend you the money on them?
A. Yes, sir.
Q. Did Mr. Gomilla send you there?
A. I think that he advised me to go there.
Q. Did he tell you to give the notes to Gurley?
A. I knew that I would have to give them if I borrowed his money.
Q. Did he tell you to hand them to Gurley?
71 A. I don't remember.
Q. They were Gomilla's notes?
A. They were the mortgage notes on his house; yes, sir.
Q. They did not belong to you?
A. They belonged to the firm.
Q. But not to you individually?
A. No, sir; to the firm.
Q. You have no interest in them?
A. They were the property of the firm; that's the only interest that I knew of.
Q. How was this $3,496.50 given to you—in cash money or by check?
A. I don't remember; I think it was a check.
Q. On what bank?
A. I don't know that.
Q. How were the $1,498.50 given to you; check or cash?
A. I don't remember, but I presume it was a check.
Q. How was the $1,000 given to you?
A. I don't remember that.
Q. Cash or check?
A. I presume it was a check.
Q. Can you state upon what bank any of those checks were drawn?
A. No, sir; I cannot.
Q. What did you do with the money?
A. I deposited it and used it in our business.
Q. It went into your books?
A. Yes, sir.

Q. To whose credit?

72 A. It went to the credit of loan account.

Q. It went into your cash book?

A. Yes, sir.

Q. How many days after you got the note did you make this transaction with Mr. Gurley?

A. I don't know that; I don't know that there was any time that intervened or not.

Q. Did Gurley know at the time that Gomilla & Co. were insolvent?

A. He knew that they had refused to accept some drafts that were presented of the Rio Grande Railroad Company.

Q. Did he know that they were unable to meet their obligations, and that they had lost their credit?

A. I don't know that he did. I could not say.

Q. Was it not a fact?

A. They were unable to meet that obligation.

Q. That they were unable to meet a great many other obligations?

A. Well, yes, sir; they were, I think.

Q. What was the amount of the obligation that they were unable to meet—about how much?

A. I don't know that.

Q. The obligations that they were unable to meet, did not those obligations am't to over eighty thousand dollars ($80,000.00)?

A. I presume they were as much as that.

Q. Did Mr. Gurley know that fact?

73 A. I don't know.

Q. Did he know that they were unable to meet any of their debts?

A. He knew that they had refused to accept some drafts.

Q. We know all that. We want something else besides that from you?

A. I don't know that he knew it at that time.

Q. Was he not counsel of the house of Gomilla & Co.?

A. Yes, sir.

Q. Were you in the habit of consulting him before you took the notes from him?

A. Yes, sir.

Q. Did you not consult with him relative to the business of Gomilla & Co.? That would have given him to understand that that firm was an insolvent firm?

A. I don't know that I ever did.

Q. You say that you withdrew some of these notes from Mr. Gurley?

A. Yes, sir.

Q. State the conversation that you had with him at the time of withdrawing them.

A. I don't remember that.

Q. Did you not give him any reasons for withdrawing them?

A. I think that I told him that I wanted some more money.

Q. You are not positive of that?

A. No, sir.
Q. What did he say to you?
A. He said that he did not have it, or something of that
74 kind, or that he could not spare it.
Q. Did you ask him for the notes?
A. I told him to give me back the notes and I would try to get the money somewhere else.
Q. He gave them back to you?
A. Yes, sir.
Q. How many did he give back to you?
A. Two of five thousand each.
Q. What did you do with those two?
A. What did we do with them?
Q. Yes.
A. I placed them in Teutonia Insurance Company. I borrowed money on them.
Q. Who was the individual of the Teutonia Insurance Company that you transacted the business with?
A. I think it was with Mr. Hall, the secretary; it may have been with Mr. Rickert; I am not sure.
Q. Did you sign any document with them?
A. I signed a note.
Q. Pledge?
A. Yes, sir.
Q. In what name did you pledge them?
A. Gomilla & Co.
Q. How much did you receive from them?
A. Five thousand dollars, I think.
Q. What did you do with the money?
75 A. I used it in business.
Q. It went into your books?
A. Yes, sir.
Q. The books will show what became of it?
A. Yes, sir.
Q. When was that loan made by Teutonia Insurance Co.?
A. In August.
Q. Of what year?
A. August 21st, 1884.
Q. When was it paid back?
A. My recollection of it is that we had it for about ten days.
Q. Where did you get the money to pay it with?
A. I got it from the State National Bank.
Q. State National Bank?
A. Yes, sir.
Q. Describe that transaction.
A. It was a loan similar to the Teutonia Insurance Co. I withdrew it from the Teutonia and placed it with the State Bank.
Q. Did you not have to pay the Teutonia the cash before they would — you up the notes?
A. Yes, sir.

Q. Did you not have to pay the Teutonia the cash before you could pledge the notes to the other bank?

A. I went in there and arranged it with them. No, I would not have to do it with them. Ordinarily they would give me the notes until I could place them somewhere else.

76 Q. Did they do that?

A. Yes, sir.

Q. They gave you the notes?

A. Yes, sir.

Q. And you went around to the State Bank and placed them there?

A. Yes, sir.

Q. That's the way that it occurred?

A. Yes, sir; I think that's the way that it occurred.

Q. With what officer in the State National Bank did you have that transaction?

A. Mr. Roach, the cashier, I think.

Q. Did you sign a pledge to him?

A. Yes, sir.

Q. What date?

A. I don't know, sir.

Q. About what time?

A. October 10th, I think.

Q. October 10th?

A. Yes, sir.

Q. Did you give them a note pledging these mortgage notes to them?

A. Yes, sir.

Q. Did you pay that note?

A. Yes, sir.

Q. And they returned you the mortgage notes?

A. Yes, sir.

77 Q. When you got these notes from the State National Bank what did you do with them?

A. I placed them in the hands of Mr. Barker.

Q. All of this was done with the advice of Mr. Gomilla?

A. No, sir.

Q. How was it done?

A. The Teutonia asked me to take up the loan and I placed it with the State Bank. I presume that Mr. Gomilla knew of it. I don't know whether he did or not. The State Bank asked me to take up the loan. They said that they did not like to loan money on mortgage paper, and I placed it with Mr. Parker. Mr. Gomilla did not know where the money was gotten from for several months after I placed it there.

Q. What day was it that you put it with Mr. Barker?

A. In November some time.

Q. Parker gave you the money at that time?

A. Yes, sir.

Q. By check?

A. No, sir.

Q. How—cash?
A. Cash.
Q. Where did he get it from?
A. I don't know; I presume that he got it from the bank.
Q. — that money go into your books?
A. No, sir.
Q. Why did it not?
78 A. Our book-keeper had left then and we were keeping no books.
Q. Did it go into any books?
A. None whatever.
Q. Can you tell what date that was?
A. It was in November some time; I don't know when; I cannot tell the date exactly.
Q. Hey?
A. I don't know what date exactly.
Q. Did you keep any memoranda of the transaction?
A. No, sir.
Q. None at all?
A. No, sir.
Q. And you entered it in no book of any kind?
A. No, sir.
Q. Neither in the commercial books nor in memoranda books?
A. No, sir.
Q. Nor in any bank book?
A. No, sir.
Q. Did you deposit in the bank?
A. No, sir.
Q. Did you give it to Mr. Gomilla?
A. No, sir.
Q. What did you do with it?
A. I paid the note at the State National Bank.
Q. How much of it did you pay to the State National Bank?
A. Two thousand dollars.
79 Q. What did you do with the balance?
A. The balance, the other two thousand dollars, I paid to Mr. Dillingham.
Q. What Dillingham?
A. Mr. Charles Dillingham.
Q. For what?
A. A deal that we had with him.
Q. That appeared by your books?
A. No, sir.
Q. Don't appear by your books at all?
A. No, sir.
Q. Did you have any papers to show the deal?
A. Yes, sir.
Q. What papers did you have to show the deal?
A. There was a memoranda of purchase of some cotton and a sale—I have forgotten exactly which; it was a future deal.
Q. What day was that?

A. When I paid the money to him, you mean?
Q. Yes?
A. In November some time.
Q. How much did you pay him?
A. Two thousand dollars.
Q. And three thousand to the bank?
A. No, sir; two thousand.
Q. That made four thousand?
A. Yes, sir.
80 Q. And the other thousand?
A. There was no other thousand. Four thousand dollars was all that I got from Mr. Parker.
Q. Did you get it from Parker all at one time?
A. No, sir; at three different times.
Q. What time did you get it from Mr. Parker?
A. What time?
Q. Yes, sir.
A. In the month of November, 1884; I have forgotten the date. All of it was gotten in the month of November, 1884.
Q. No date?
A. No; I don't remember the date.
Q. No memoranda kept of dates?
A. He kept a memoranda of the dates.
Q. But you have got none?
A. No, sir.
Q. Did he give you any receipt for the mortgage notes?
A. None whatsoever.
Q. Did you give him any note for the money that he loaned you?
A. No, sir.
Q. Did you give him any receipt for the money that he loaned you?
A. No, sir.
Q. You gave him nothing?
A. No, sir; I gave him the notes.
Q. How much did he give you the first time?
81 A. Two thousand dollars.
Q. It was then that you gave him what?
A. I gave him both notes.
Q. Describe the notes. How much were the notes?
A. Two notes of five thousand dollars each.
Q. In what place was the transaction made?
A. Produce Exchange, I think.
Q. It was there that you gave him the notes and there he gave you the money?
A. Yes, sir.
Q. Who was present?
A. Nobody.
Q. Did that money go into your books?
A. No, sir.
Q. Gomilla & Co. were then doing business?
A. Yes, sir.

Q. Why did it not go into your books?
A. We had no book-keeper, and I knew that the transaction would show for itself at any time. We rec'd the money and paid it out.
Q. Did you have an account with Dillingham?
A. An account?
Q. Yes, sir.
A. No, sir.
Q. With Dillingham?
A. No, sir; we had a deal with him.
82 Q. No account on the books of that deal?
A. No, sir.
Q. Your books do not show that you owed him any money?
A. Not a dollar.
Q. They do not show that you paid him any money?
A. No, sir.
Q. What is Dillingham's first name?
A. Charles.
Q. After this transaction were not entries made in the books of Gomilla & Co. for anybody?
A. No, sir; I think not. I think that the last entries made in those books were in October.
Q. Of what year?
A. 1884; that's my recollection of it.
Q. Did Gomilla tell you to borrow this money from Parker?
A. No, sir; Mr. Gomilla was in St. Louis when I got the money.
Q. Did you deposit the money in bank yourself?
A. No, sir; I never deposited it at all.
Q. Then, there is no written record of that transaction at all?
A. No, sir.
Q. There is no evidence of or witness to it but yourself?
A. No, sir.
Q. What else did you borrow from Mr. Parker?
A. Nothing.
Q. Do you say that you borrowed $2,000.00 at one time, and how much at another?
A. One thousand.
83 Q. What day did you borrow the one thousand?
A. I don't know.
Q. What day did you borrow the other one thousand?
A. I don't know.
Q. And all of the amounts were paid to you in cash?
A. Yes, sir.
Q. In bills?
A. Yes, sir.
Q. Of what denomination?
A. I don't know; fives, tens, twenties, etc., I suppose.
Q. Did Mr. Parker take it out of his pocket and hand it to you?
A. He went to the bank and drew it and came out and handed it to me.
Q. Where?
A. Louisiana National Bank, I think.

Q. Where did he hand it to you at?

A. Outside of the bank; somewheres on the street or in the entrance there.

Q. What bank do you say that it was?

A. The Louisiana National Bank, I think it was.

Q. Are you sure of it?

A. No, sir.

Q. But you went to the bank with him?

A. Yes, sir.

Q. And he went inside of the bank, got the money, brought it out, and gave it to you?

A. Yes, sir.

84 Q. Where did he give it to you at?

A. Somewheres on the street, near the bank.

Q. Can you make certain of what passed?

A. No, sir; I am not positive of it. My recollection of it is that it was the Louisiana National Bank.

Q. What street is it on?

A. Common between Camp and St. Charles.

Q. What conversation did you have with him at the time that you gave him the mortgage notes?

A. That I don't remember. I presume I told him that I wanted to borrow some money on them.

Q. Well, what did he say?

A. He said that he could lend me some.

Q. What else?

A. And he loaned me two thousand dollars ($2,000.00). I went to him another day and I told him that I wanted one thousand dollars and he gave me that. Another day I went to him and I told him that I wanted one thousand dollars and he gave it to me.

Q. What else was said? That's what you have already told us.

A. I don't remember the conversation.

Q. What bargain did you make with him about it?

A. I gave him the notes as collateral.

Q. What verbal understanding or bargain did you make with him?

A. I don't remember that I made any bargain.

Q. Did you not say for how long you would have the money?

A. I told him that probably I would not want it but for a

85 few days.

Q. How much interest was you to pay him?

A. We did not agree upon a rate of interest at all.

Q. Did you give him any note to represent what you borrowed?

A. No, sir.

Q. Did you give him any receipt for the money?

A. No, sir.

Q. And nowhere entered it on the books?

A. No, sir.

Q. Did you ever account to A. J. Gomilla about this transaction?

A. I told him that I had borrowed the money.

Q. He was in St. Louis?

A. He was in St. Louis, as I told you, when I borrowed the money, and when he got home I told him that I had borrowed four thousand dollars ($4,000.00).

Q. Did you tell him from whom?

A. No, sir; he did not ask me. I told him what I had done with it.

Q. What did he say?

A. I don't remember what he said.

Q. Had you any interest in those mortgage notes that you handed to Parker, except the fact that you were interested in the firm of Gomilla & Co.?

A. None whatsoever.

Q. The debt to Dillingham, whose debt was it?

A. Gomilla & Co.'s.

Q. And you had no moneys coming to you from that firm of Gomilla & Co.?

86 A. I had any which?

Q. Assets.

A. None at all.

Q. None at all?

A. No, sir.

Q. It was altogether Gomilla's business?

A. Yes, sir.

Q. These mortgage notes were altogether Gomilla's business?

A. They were the property of Gomilla & Co.

Q. But they were in reality Gomilla's notes?

A. No, they were not; they were the property of Gomilla & Co.

Q. You had no interest in that firm?

A. Yes, sir; one quarter.

Q. Nominal?

A. In the earnings.

Q. Nominal?

A. In the earnings, I tell you.

Q. Therefore if anybody had loaned money to Gomilla & Co. it would have all gone to Gomilla?

By Mr. NIXON: I object as leading; and, second, its asking the witness for an opinion on a question of law.

Q. At that time was not Gomilla fixing himself to avoid his creditors?

A. No, sir.

Q. Did he not talk to you and tell you that he would start business in some other name to avoid them?

A. No, sir.

87 Q. Did you ever know him to write a letter to that effect?

A. What effect?

Q. That he would go into business in some other name if his creditors did not accept his terms.

A. No, sir.

Q. Did you write any letters for him?

A. No, sir.

Q. Whose handwriting is that? (Document shown witness.)
A. Mr. Labatt's.

By Mr. NIXON:

Q. What Labatt?
A. Leon Labatt.

By Mr. BRIGHT: Witness being shown letter dated 9th of June, 1884, states that it is in the handwriting of Mr. Labatt.

By Mr. NIXON: Counsel for the defendant objects to the test'y of the witness in regard to the handwriting and signature to the letter in question unless the letter is identified in some way by the person taking the testimony.

By Mr. GRANT: I object further because counsel refuses to exhibit to respondents' counsel.

By Mr. BRIGHT:

Q. Did Mr. Gomilla have some furniture and some wagons?
A. Yes, sir.
88 Q. Did he not make a transfer of them to somebody?

By Mr. GRANT: I object as ir- and not pertinent to the issue.

By Mr. BRIGHT:

Q. Do you refuse to answer the question Mr. witness?
A. Yes, sir.

By Mr. NIXON:

Q. If the court should rule that the question was a proper question would you answer it?
A. Yes, sir.

By Mr. BRIGHT:

Q. Do you know Mr. Breedlove Smith?
A. Yes, sir.
Q. Do you know that there was a judgment rendered in favor of Gomilla & Co. against Keeler Bros.?

By Mr. NIXON: I object to that on the ground that the judgment is the best evidence of its contents.

By Mr. BRIGHT:

Q. Against Keeler Bros.?

By Mr. NIXON: I object to any testimony in regard to the judgment unless a copy of the judgment be produced.

By Mr. GRANT: I object as being impertinent and not relevant to this suit.

89 By Mr. GRANT: We do not object to the witness answering the question, but we reserve our objection to the evidence.

A. Yes, sir.

By Mr. BRIGHT:

Q. Do you know that since it was rendered that Gomilla & Co., either Mr. Gomilla or you or both, went before Hero, notary public, and prepared documents to enable Breedlove Smith to attach that property in St. Louis?

By Mr. GRANT: We object to that because it is not involved in this suit, irrelevant, and impertinent, and we advise the witness that he is under no necessity to answer that question.

By Mr. BRIGHT:

Q. What do you say, Mr. Torrey?
A. In regard to that question?
Q. Yes, sir.
A. I refuse to answer it.
Q. Was it you or Mr. Gomilla that went to Mr. Hero's office?

By Mr. GRANT: I make the same objection to this question.

By Mr. BRIGHT:

Q. Do you refuse to tell us?
A. Yes, sir.

Q. Was Breedlove Smith at any time a clerk of Gomilla?
90 A. Yes, sir.

Q. When he was in St. Louis what business relations did he have with Gomilla?

A. He has been connected with Gomilla for several years; he was not a clerk of Gomilla & Co.

Q. Did you ever make a statement of the assets and liabilities of Gomilla & Co.?

A. No, sir; I think not.
Q. Did you ever see one?
A. Did I ever see a statement?
Q. Yes.
A. No, sir.
Q. Did you not see one that M. J. Gomilla had?
A. M. J. Gomilla?
Q. Did you not see one that M. J. Gomilla had?
A. I don't remember that I did.

Q. Was it not handed to him by the firm of Gomilla & Co., and was it not sent to Brownsville by Gomilla & Co., and whilst in Brownsville did they not use him for the purpose of effecting a settlement with their creditors?

A. Mr. M. J. Gomilla lived in Brownsville; I don't know whether Gomilla & Co. ever sent him a statement of their assets or not; they may have done so; I don't remember that.

Q. Did you not have correspondence with him relative to your business affairs?

A. Yes, sir.

Q. And about making a settlement with your creditors
91 there?

A. Yes, sir.

Q. Did you not give him a list of those creditors there?
A. Yes sir; I don't know; I presume that we did.
Q. Have you got a copy of it in your office?
A. No, sir.
Q. Do you say positively that you did not give Mr. M. J. Gomilla a statement of your affairs to execute a settlement with the Rio Grande Railroad Co. and your other creditors in Brownsville?
A. No, sir; I don't say that.
Q. Did you give him such a document for such a purpose?
A. I say that I don't know.
Q. Do you know that he had one?
A. No, sir.
Q. Did any ever issue from your office?
A. I don't know that.
Q. What do you know about it?
A. Know about what?
Q. About what I have been asking you; do you know anything about it?
A. I don't know anything particularly, except that there may have been a statement sent to Mr. Gomilla and there may not have been, but it's likely that there was.
Q. What day was it likely to have been sent?
A. I don't know that.
Q. Could such a statement be made again from your books?
A. The amount of our liabilities and assets?
92 Q. Yes, sir.
A. Yes, sir.
Q. Look at the document purporting to be the assets and liabilities of Gomilla & Co., now handed to you, marked Exhibit "A," and state whether it is not a statement of the assets and liabilities of Gomilla & Co.
A. I don't know anything about this document. It did not come from our office. There are some am'ts in here that I recognize as part of the assets of Gomilla & Co.
Q. State what amounts you recognize in that document as part of the assets of Gomilla & Co.
A. A. J. Gomilla's residence, for instance; property in Illinois; stocks in elevator; mortgages, notes of the Phœnix Mill; hull of the bark Concordia; steam-engines; steamship Deronda; and these other amounts, I do not know whether they are correct or not. Shall I call them out?
Q. Hey?
A. These amounts here, I do not know whether they are correct or not.
Q. But you had such assets?
A. Yes, sir.
Q. And the liabilities on that document, do you recognize them?
A. I don't know whether the amounts are correct or not.
Q. But you recognize them as being liabilities?
A. Yes, sir; I don't know whether these amounts are correct or not, but we did owe these people some money, I know.

93 Q. That document must have originated from the office of Gomilla & Co.?

A. I don't know; I do not recognize the writing.

Q. But the original of this, if that be a copy, must have been originally from the office of Gomilla & Co.?

A. I expect it did.

Q. Have you any doubt about it?

A. Well I can't imagine how anybody could get that information unless it had originated from our office.

Q. Don't you recognize that as a copy of the original?

A. No, sir.

Q. That was sent to Brownsville?

A. No, sir.

By Mr. NIXON: Counsel for Mr. Parker objects to any testimony in regard to the said account, or to the account itself, on the ground— First. That there is no evidence to show the date of the said account; and, second, that the declarations of Gomilla & Co. outside of the presence of the defendant Parker are not competent testimony against Parker.

By Mr. BRIGHT:

Q. Is there any item in that document that you wish to say is incorrectly stated?

94 A. I don't know that there is a single item in there incorrectly stated. I don't know that it is correct. As to the amounts, I don't know anything about that.

Q. You don't know that a document like that was ever made out?

A. No, sir; a document of that — could have been made out in the office without my knowing anything about it.

Q. You kept copy-press books during the whole time of that firm's existence?

A. Yes, sir.

Q. What has become of the property in Illinois?

By Mr. GRANT: We object to that as irrelevant and impertinent.

By Mr. BRIGHT:

Q. Do you object to answering?

A. Yes, sir; being so advised by counsel.

Q. What has become of the stock in elevator, $5,000.00?

By Mr. GRANT: I make the same objection.

By Mr. BRIGHT:

Q. Do you object to answering?

A. Yes, sir; as I stated, under advice of counsel.

Q. What has become of each and every item of assets in that document?

By Mr. GRANT: I make the same objection.

A. I object to answering.

95 By Mr. BRIGHT:

Q. Have you any information, certain or uncertain, by which I can prove that this is a copy of the original paper that emanated from your office?

A. Have I any information?

Q. Certain or uncertain, by which I can prove that this is a copy of the paper that emanated from your office?

A. I don't know whether I have or not.

Q. Hey?

A. I expect that if we sent a document of that kind to Brownsville that there is a copy, but I don't know anything about it; I don't know that I have ever seen it.

Q. Have you the letters written back to you by Mr. M. J. Gomilla?

A. I may have; I don't know whether I have or not.

Q. Don't you keep your letters?

A. Usually; yes, sir.

Q. Would there be any reason for not having kept a copy of those letters written by M. J. Gomilla?

A. None in the world.

Q. Therefore you are certain that you have kept them?

A. No; I ain't.

Q. Why are you not certain that you have kept them?

A. Because the firm has been dissolved two or three years, and they may be scattered all over.

Q. Are you certain that you have got the commercial books of the firm?

96 A. I have got the cash book, ledger, and journal.

Q. And you have told us that there were no others.

A. No, sir; there are the check books and so on.

Q. Now, tell us all of the books that you have belonging to A. J. Gomilla & Co.?

A. I have not looked at them for two or three years—a couple of years anyhow. We have got the ledger, journal, and cash book.

Q. Did you use any other books?

A. Yes, sir; check books.

Q. Did you have any others?

A. Yes, sir; we used copy books, letter-press books.

Q. What kind of copy books?

A. Ordinary copy books.

Q. Press copy books?

A. Yes, sir; press copy books.

Q. Did you use any others?

A. I think not; no, sir.

Q. You are sure of it?

A. No, sir.

Q. Were you not a partner in the house?

A. Yes, sir.

Q. And you are not sure of what books you had?

A. Those were the only books that were necessary for the business.

Q. I want to know whether you used any other books than
97 those that you have specially mentioned?
A. I don't know.
Q. Will you now state to us what books you have?
A. I have the cash book, journal, and ledger.
Q. Have you any other books?
A. I don't know that I have.
Q. Have you ever missed any of your books?
A. No, sir.
Q. Have you any reason to think that you have not all that you ever had?
A. No, sir.
Q. Have you any property of your own?

By Mr. GRANT: I object to that. You need not answer that, as it is impertinent and irrelevant.

A. I object to answering.

By Mr. BRIGHT:

Q. Are you solvent or insolvent?

By Mr. GRANT: I object for the same reason.

A. I object to answering.

By Mr. BRIGHT:

Q. When Mr. Gomilla made that mortgage did you give Gomilla ($18,000.00) eighteen thousand dollars cash?
A. No, sir.
Q. Have you ever at any time advanced eighteen thousand dollars ($18,000.00) to him?
98 A. No, sir.
Q. Did anybody advance eighteen thousand dollars ($18,000.00)?
A. No, sir.
Q. The mention of that amount in the act of mortgage was really a nominal sum—no reality?
A. No, sir.

Cross-examination.

By Mr. GRANT:

Q. When did you form the partnership in question with Mr. Gomilla?
A. I think it was in the latter part of 1881.
Q. Do you remember when he acquired the right to the residence property covered by this eighteen-thousand mortgage?
A. No, sir; I do not.
Q. At the time that the property was acquired by Mr. Gomilla was it not agreed between you and him that the residence property should be used as the basis of credit for the firm?

By Mr. BRIGHT: I object to that on the ground that it is a leading question.

A. Yes, sir; it was money of our concern.

By Mr. GRANT:

Q. For what purpose was the five thousand dollars advanced by Mr. Gurley on these mortgage notes? What was it used to pay?

99 A. The Hibernia Insurance Co., the mortgage that they had on the property for five thousand dollars.

Q. Was the money used for that purpose?

A. Yes, sir; I paid it myself.

Q. That was part of the purchase price of the property?

A. Yes, sir.

Q. Now, state whether the mortgage was not executed for the purpose of enabling the firm of Gomilla & Co. to raise money on the pledge of these notes as collateral.

A. Yes, sir.

By Mr. BRIGHT: I object to it as leading.

By Mr. NIXON:

Q. Mr. Torrey, you said that you were a member of the firm of Gomilla & Co.?

A. Yes, sir.

Q. And your interest in that firm was how much?

A. Twenty five per cent. of the net earnings.

Q. And the other three-quarters interest in the firm was owned by whom?

A. Mr A. J. Gomilla.

Q. About what time was that firm dissolved?

A. About the beginning of 1885, I think.

Q. After that time did you or Mr. Gomilla, or either of you, continue to do business?

A. After the dissolution?

Q. Yes.

A. Mr. Gomilla continued to do business.

100 Q. And yourself?

A. He gave me a position in the new concern.

Q. You stated that the firm of Gomilla & Co. had a book-keeper?

A. Yes, sir.

Q. And that the last one was Mr. Leon Labatt?

A. Yes, sir.

Q. How long had he been your book-keeper?

A. He had been with the firm ever since it was a firm; but he had not been the book-keeper all of that time. I suppose that he had been keeping the books about a year.

Q. Devoting himself entirely to book-keeping?

A. He used to write letters and did whatever work was to be done around the office.

Q. When did he cease to be in your employ?

A. I think it was on the first of November, 1884.

Q. You had, then, no longer need for a book-keeper?

A. No, sir.

Q. Were any books kept after he was discharged?
A. No, sir.
Q. So your books only show entries after the first of November, 1884?
A. No, sir.
Q. Now, you have testified pretty fully in regard to eight thousand dollars of this paper—one note for five thousand and one note for three thousand dollars—which was left with Mr. Gomilla?
A. Yes, sir.
101 Q. Now, I desire to call your attention to the two notes of five thousand dollars each.
A. Yes, sir.
Q. You said that they were withdrawn from Mr. Gurley and pledged where?
A. Teutonia Insurance Co.
Q. For what amount?
A. Five thousand dollars, in my recollection.
Q. And that they were withdrawn from the Teutonia Insurance Company and pledged with the State National Bank?
A. Yes, sir.
Q. How did you come to make that change?
A. The Teutonia requested me to take up the loan and I placed it with the State Nat'l Bank.
Q. Did you pledge them for any specific time or demand note?
A. Demand note.
Q. What was the interest?
A. Eight per cent.
Q. Is that the usual interest in New Orleans Banking Institutions?
A. Yes, sir.
Q. Then you applied to the State Bank?
A. Yes, sir.
Q. How much did you borrow upon them?
A. I think that I borrowed five thousand dollars from them.
Q. On the pledge of this paper?
A. Yes, sir.
102 Q. And no other?
A. No, sir.
Q. Just this paper?
A. Yes, sir.
Q. This ten thousand dollars ($10,000.00) of paper?
A. Yes, sir.
Q. What interest did you pay them?
A. The same, eight per cent.
Q. How long did it remain pledged to the State National Bank before you pledged them to Mr. Parker?
A. I don't think longer than ten days.
Q. How did you come to take up the note at the State National Bank—at whose request?
A. At the request of the officers—either Mr. Kennedy or Mr. Roach.
Q. Did you give a demand note there too?
A. Yes, sir.

Q. Now, you stated that you borrowed altogether ($4,000.00) four thousand dollars from Mr. Parker?

A. Yes, sir.

Q. And you — that two thousand of this went to the State National Bank and the other two thousand to Mr. Dillingham?

A. Yes, sir.

Q. Now, when you transferred the pledge from the Teutonia Insurance Company to the State National Bank, who carried the notes from one institution to the other?

A. I did.

103 Q. Did you pay the Teutonia Insurance Company before they gave up the notes, or did they take your word that you would either return the notes, or how was it?

A. I don't recollect how that was done. I know I got permission from the State Bank to draw a check upon them with the permission of bringing the notes later.

Q. Then the State National Bank permitted you to draw a check upon your promise to bring the notes?

A. Yes, sir.

Q. And then you did so?

A. Yes, sir.

Q. That is not an extraordinary thing, for an insurance company or bank to have that much confidence in a man doing business with them?

A. No, sir.

Q. To allow them for a short time to have possession of notes in order to place them somewhere else?

A. No, sir; not an unusual thing.

Q. Is that an extraordinary thing?

A. No, sir.

Q. When you handed these notes to Mr. Parker you had gotten them from the State National Bank?

A. Yes, sir.

Q. How much money did you pay the State National Bank?

A. I got originally from the State Bank five thousand dollars ($5,000.00). I reduced that to ($3,000.00) three thousand dollars. I did that with funds that came into the concern.

104 Q. You say that you reduced by three thousand or two thousand?

A. I reduced it by paying three thousand dollars ($3,000.00) on account, and there then remained only two thousand dollars due.

Q. At the time that you borrowed the money from Mr. Parker how much was due to the bank where those notes were pledged?

A. Two thousand dollars.

Q. Did the State Bank permit you to withdraw the notes and hand them to Mr. Parker previous to your paying the two thousand dollars ($2,000.00) or did Mr. Parker hand you the two thousand dollars and then go to the bank and pay them?

A. He handed me the two thousand dollars and I went and paid the notes.

Q. How long afterwards?

A. Half an hour.

Q. Subsequently you stated that you borrowed one thousand and then another thousand?

A. Yes, sir.

Q. And at time the notes were in Mr. Parker's possession?

A. Yes, sir.

Q. Have they been in his possession continuously ever since?

A. I believe that they have. To the best of my knowledge, they have.

Q. Have you any recollection of at any time trying to place the notes elsewhere?

A. Yes, sir.

Q. Had you possession of the notes for that purpose?

105 A. Yes, sir.

Q. For how long?

A. I do not remember. I think I had them over one night once.

Q. For what purpose?

A. To place them somewheres else.

Q. Did you succeed in doing so?

A. No, sir.

Q. Did you try?

A. Yes, sir.

Q. Did you return the notes to him?

A. Yes, sir.

Q. You have already stated the purpose for which they were placed in your possession?

A. Yes, sir.

Q. When was that?

A. Probably in December, 1884.

Q. That was shortly after he got the notes?

A. Yes, sir.

Q. Now, sir, what passed between you and Mr. Parker in regard to his retention of these notes?

A. He told me after he had them for some time that he wanted the money, and that if the money was not paid within a certain time that he would consider the notes as his.

Q. What did you say to that?

A. All right.

Q. You said, "All right?"

A. Yes, sir; I couldn't raise the money.

Q. And you agreed to that?

106 A. Yes, sir.

Q. Could you fix that date, Mr. Torrey?

A. No, sir; I could not.

Q. Could you fix that date accurately?

A. No, sir.

Q. You are positive that there was such an agreement?

A. Yes, sir.

Q. Now, you stated, Mr. Torrey, that two thousand dollars of this money that was borrowed from Mr. Parker was paid to Mr. Charles Dillingham?

A. Yes, sir.
Q. Is he doing business in New Orleans?
A. No, sir.
Q. Where is he doing business?
A. He is over in Texas—over in Houston, Texas.
Q. Was he doing business here at that time?
A. He was a future broker here then.
Q. Where was his office?
A. Over the Union Nat'l Bank.
Q. Was this deal in futures in cotton or grain?
A. In cotton.
Q. On the New Orleans Cotton Exchange?
A. New Orleans Cotton Exchange.
Q. It was a deal for whose account—for the account of Gomilla & Co., or account of Mr. Gomilla, or for the account of Mr Torrey?
A. It was for the account of Gomilla & Co.
Q. Did that two thousand dollars pay the total claim that you owed Mr. Dillingham, or was it on account, or was it a margin?
107 A. A margin.
Q. An original margin or a margin that was called for in consequence of prices going against you?
A. It was a margin that was called for.
Q. You have stated, Mr. Torrey, that at the time that this mortgage was made by Gomilla & Co., by Mr. Gomilla to Gomilla & Co., that there was no money actually passed before the notary?
A. No, sir.
Q. This ($18,000.00) eighteen thousand dollars?
A. No, sir.
Q. What was the purpose of making that mortgage from Gomilla to Gomilla & Co.?
A. So that we could put it in shape and use the money.
Q. For what purpose?
A. Carrying on the business of Gomilla & Co.
Q. Subsequent to the first of November, 1884, did you make any other transactions, besides this one of Parker's, that was not entered in your books?
A. I don't know whether we did or not.
Q. You have stated that there was no entries made after November first?
A. No, sir.
Q. In this transaction with the State National Bank by which you took up the notes after the 1st of November, was it entered in your books?
A. I did not make it after the first of November; the trans-
108 action with the State Bank was made before the first of November.
Q. I mean the transaction by which you took up the notes there and turned them over to Mr. Parker; was that entered in your books?
A. No, sir.
Q. Was there any portion of it entered in your books?

A. No, sir.

Q. What I want to get at is as to whether there was anything extraordinary in this one transaction not being entered in your books after the first of November?

A. There was no need after the first of November, in my opinion.

Q. Did you make any effort, after you had borrowed the four thousand dollars from Parker, to borrow some more money on the same collateral?

A. I think that I did.

Q. What did he say?

A. That he would not loan any.

Q. And you made an effort to pledge some notes to take up this paper?

A. Yes, sir.

Q. And you could not do it?

A. Could not do it.

Q. Referring to this document marked "A," if that represents anything that ever came from your office, at what time must it have been issued?

A. That I could not say; probably the first part of the year 1884.

109 Q. Before the mortgage for ($18,000) eighteen thousand dollars was made or afterwards?

A. Before.

Q. Was Mr. Gomilla's residence mortgaged at any time previous to the one that is in controversy here? What I mean is, Was it subject to any mortgage when he purchased it?

A. Yes, sir; he owed the Hibernia Insurance Company five thousand dollar ($5,000.00).

Q. On the property?

A. Yes, sir; for the purchase price.

Q. I note that this document "A" states that Mr. Gomilla's house is subject to a mortgage of five thousand dollars.

A. Yes, sir.

Q. Was that mortgage for five thousand dollars in favor of the Hibernia Insurance Company taken up before this eighteen-thousand-dollar mortgage was made?

A. Either on the same day or immediately afterwards.

Q. Do you know whether the mortgage certificate shows that at the time that the eighteen-thousand-dollar mortgage was made that the property was entirely clear?

A. No, sir.

Q. You don't remember?

A. No, sir.

Q. Are you able to state, from your recollection, whether or not this five-thousand-dollar mortgage was taken up either before or at the same time that the eighteen-thousand-dollar mortgage was made?

A. No, sir; I don't remember that; it happened about the same time.

110 By Mr. BRIGHT:

Q. Mr. Torrey, you say that you drew the check on the State National Bank to pay the Teutonia Insurance Company?

A. Yes, sir; I believe that was the way of it.

Q. You must have a check book?

A. Yes, sir.

Q. You say that after you pledged these notes to the State National Bank you diminished the amount from five thousand to three thousand dollars?

By Mr. GRANT: We object as a leading question.

A. I object to answering.

By Mr. GRANT: You can go on and answer.

By Mr. BRIGHT: Put that down.

By Mr. GRANT: I object to having it put down. Put down what my conversation with Mr. Bright is. Are you ready, Mr. Bright?

(Mr. BRIGHT:) Yes; I am waiting on you.

By Mr. GRANT: State that I made a side remark to the witness, who objected to answer after I made my objection, which the witness misunderstood.

By Mr. BRIGHT:

111 Q. Mr. Torrey, you state that after you pledged these notes to the State National Bank for five thousand dollars you reduced the amount by sundry payments to two thousand dollars?

By Mr. GRANT: I object to that as a leading question.

A. Yes, sir; I reduced that loan three thousand dollars.

By Mr. BRIGHT:

Q. What were the amounts of the sundry payments by which you made the reductions?

A. I did not say that I made them by several payments. I made it by one payment.

Q. What was that amount?

A. Three thousand dollars.

Q. You must have a check representing that three thousand dollars?

A. Yes, sir.

By Mr. GRANT: I object as leading.

By Mr. BRIGHT:

Q. You must have had some other books in which you entered this three thousand dollars?

By Mr. GRANT: I object to that as leading.

A. I don't know whether I have another book or not. I don't know what kind of a book you mean.

By Mr. BRIGHT: I mean any kind.

A. I had a check book, and that was the only book that it was entered in. It was probably entered in the cash book—prob-
112 ably after that.

Q. Then you had a cash book?

A. Yes, sir.

By Mr. GRANT: I object as leading.

By Mr. BRIGHT:

Q. And that cash book was after the business of Gomilla & Co. had closed?

A. No, sir.

By Mr. GRANT: I make the same objection. I did not say that I had reduced that loan after the business had closed.

By Mr. BRIGHT:

Q. At the time that you reduced it Gomilla & Co. were keeping books?

A. Yes, sir.

By Mr. GRANT: Same objection.

By Mr. BRIGHT:

Q. These books show these entries?

A. Yes, sir.

Q. Do they show these entries?

A. I presume that they do.

Q. What account in the books must I look to for that entry?

A. Look in loan account.

Q. You say that you tried to place the notes of some one else that Parker held?

A. Notes; yes, sir.

Q. What was that some — else?

113 A. I have forgotten; I don't know.

Q. How many persons did you try?

A. I don't know that I tried more than one.

Q. Who was that one?

A. I don't know; I have forgotten. I think it was some friend of Mr. Dillingham; that's my recollection of it.

Q. This transaction with the State National Bank was in what year?

A. October, 1884?

Q. Up to October, 1884, Gomilla & Co. kept books?

A. Yes, sir.

Q. Kept books up to that month?

A. Yes, sir.

Q. And for how long after?

A. Nothing written up in our books after October.

Q. After October, 1884?

A. Nothing after October, 1884.

Q. Did Gomilla & Co. have any transactions after October, 1884?

A. I don't remember; I believe that they did have a few.

Q. Don't you know that they had?

A. No, sir; except this transaction that I borrowed money from Mr. Parker.

Q. Don't you know that they had transactions by which they settled a claim with Avendano Bros.?

By Mr. GRANT: Same objection as previously made, and also that it is not pertinent.

A. I object to answering.

114 By Mr. BRIGHT:

Q. You know that they actually paid Avendano Bros. some moneys on account of their previous indebtedness, and must necessarily have charged and entered those moneys in their books?

By Mr. GRANT: Same objection.

A. Under advice of counsel, I refuse to answer.

By Mr. BRIGHT:

Q. Don't you know that after November, 1884, they gave out notes of Gomilla & Co.?

By Mr. GRANT: Same objection.

A. I object to answering.

By Mr. BRIGHT:

Q. Did you not give out some of those notes yourself?

By Mr. GRANT: I make the same objection.

A. I object to answering.

By Mr. BRIGHT:

Q. You refuse to answer that?

A. Yes, sir.

Q. Did you at that time have books in which these transactions of which I have inquired of you are entered?

By Mr. GRANT: I make the same objection.

A. I object to answering.

By Mr. BRIGHT:

Q. Mr. Torrey, have you got any memoranda, books, or
115 papers of any kind in which the transactions—some or all of them—of Gomilla & Co. have been entered since November, 1884?

By Mr. GRANT: I object to that question as leading, and also as being impertinent.

A. I refuse to answer.

EXHIBIT "A" Annexed to Testimony of Torrey.

Assets.

$20,000	A. J. Gomila's residence, subject to mortgage ---	5,000
3,000	Property in Illinois, " " ---	1,500
75,000	Stock in elevators, " pledge -----	42,500
16,000	Mortgage notes, Phœnix mill, subject to pledge-	9,000
		$58,000
1,200	Hull of bark Concordia.	
1,500	One steam-engine.	
24,500	Steamship "Deronda," in suit.	
1,500	Fulner, Boyce & Co., "	
6,200	John T. Milliken, "	
6,400	Barttell, Kuhn & Co., "	
2,200	Open accounts.	
2,000	Bank & insurance stocks.	
2,000	Eads Concession Co. stock.	
$161,500	Amount forward.	
$161,500	116 Amount forward.	
4,850	Atlantic Milling Co.	
5,200	Cash in bank.	
171,550		
58,000	Amount of pledges.	
$113,550		

Liabilities.

Rio Grande R. R., Brownsville, Texas ----------	$26,692
D. R. Francis & Bro., Saint Louis, Missouri ----------	26,000
Agustin Miralles, Brownsville, Texas----------	6,736
Miguel Fernandez, " " ----------	867
H. L. Wiechers, Orizaba. This includes 5,500 provisionally to cr. of Carruthers & Allen ----------	8,992
Callep, Hnos & Co., Vera Cruz----------	1,500
Bello & Cabrera, Pueblo----------	6,500
A. Sayago, Jalapa ----------	370
Teutonis Insurance Co. (N. Y.), N. Orleans----------	1,240
Taxes ----------	1,000
J. Ward Gurley, Jr., city fees----------	1,750
	$81,647

Testimony of Albert P. Noll, for Plaintiff.

United States Circuit Court, Fifth Judicial Circuit, Eastern District of La.

117 RIO GRANDE RAILROAD COMPANY *vs.* A. J. GOMILLA *et als.* } No. —.

Testimony taken before the Honl. E. R. Hunt, examiner, at the office of the clerk of the U. S. circuit court, New Orleans, La., Saturday, December 9th, 1885.

Appearances: George L. Bright, Esq., for plaintiff; Rouse & Grant, for Gurley; J. O. Nixon, Jr., Esq., for Parker.

Testimony of Albert P. Noll, p. 2.
Thomas R. Roach, 10.

ALBERT P. NOLL, Esq., sworn on behalf of plaintiff, says:

By Mr. BRIGHT:

Q. What is your full name?
A. Albert P. Noll.
Q. You are the secretary of the Teutonia Insurance Co.?
A. Yes, sir.
118 Q. Do you know Mr. Gomilla?
A. Yes, sir.
Q. Do you know Mr. Torrey?
A. Yes, sir.
Q. Do you know Mr. Parker?
A. I know the gentleman by sight.
Q. Do you know Mr. Gurley?
A. Yes, sir.
Q. What family relation exists between them?
A. I don't know.
Q. You know Mr. Torrey, the partner of Mr. Gomilla?
A. Yes, sir.
Q. As secretary of the Teutonia Insurance Company did you ever make any loan or loans to Gomilla & Co.?
A. Yes, sir.
Q. State what they were, or upon what dates and what amounts.
A. We made the loan to Messrs. Gomilla & Co. for five thousand dollars on August 21st, 1884, with collaterals on two mortgage notes.
Q. Describe the mortgage notes.
A. I have no record of them, but as far as I can recollect they were two mortgage notes of five thousand dollars each, upon property known as his residence. I don't remember the dates of them.
Q. When was that loan paid to you?
A. That was paid on August 30th.

Q. By whom was it paid?

119 A. It was paid by check to the firm. I don't remember which one of the firm paid it.

Q. What became of the notes that were pledged to you when the loan was paid?

A. I don't know; I turned them over to them.

Q. To whom?

A. If I recollect right, I think it was to Mr. Torrey.

Q. Have you got them in your possession now?

A. No, sir.

Q. What next loan did you make?

A. We made another similar loan on September 3, '84.

Q. To whom?

A. To Messrs. Gomilla & Co.

Q. On what?

A. On the same mortgage notes.

Q. Are you sure that it was on the same mortgage notes?

A. Yes, sir.

Q. When was that loan paid back to you?

A. That was paid back on October 10th.

Q. Was the whole am't paid back to you on 10th Oct.?

A. Yes, sir.

Q. What did you do with the mortgage notes?

A. I turned them over to the parties who handed me the check.

Q. Before you were paid the amount of your loans did you part with those notes?

A. That I don't recollect.

120 Q. Did you give them to Mr. Torrey before you got his check?

A. That I don't recollect, whether he got them previous to giving the check or not. The check was paid that day and the mortgage notes turned over to him. Whether they were delivered previously that day or not I don't recollect. I don't remember that exactly.

Q. You don't remember whether you gave him the mortgage notes before he had paid you the loan?

A. No, sir; I don't recollect that.

Q. What became of the act of pledge?

A. We have an act of pledge and note combined, which the parties sign, and we generally return that to them when they pay the note.

Q. Did you return that to Gomilla & Co. when that note was paid?

A. Yes, sir.

By Mr. NIXON:

Q. You stated that you do not recollect as to whether or not you returned these mortgage notes to Mr. Torrey before the am't for which they were pledged was paid?

A. I cannot recollect that positively. It may have been the case. We do that often.

Q. Do you or not do so in cases where the collateral is to be placed elsewhere?

A. Yes, sir.

Q. And where the money is to be raised upon it in another place for the purpose of paying you?

121 A. Yes, sir.

Q. Do you sometimes, in such cases, give the pledger, when he is a man in whom you have confidence, the collaterals in order to raise the money, and then he comes back and pays you?

A. Yes, sir; we do that often.

Q. That is not an extraordinary thing?

A. No, sir.

By Mr. BRIGHT:

Q. The mortgage notes that you held as security, have they any of your marks upon them?

A. No, sir; we have no marks upon them. We simply attach them to the note.

Q. They would not have any writing put upon them by you to connect them with the transaction?

A. No, sir; not when we hold them as collateral.

Mr. T. R. ROACH, sworn on behalf of plaintiff, says:

By Mr. BRIGHT:

Q. What is your name?

A. Thomas R. Roach.

Q. What is your occupation?

A. Cashier of the State National Bank.

Q. Mr Roach, did your bank make a loan to Gomilla & Co., or two loans, in 1884?

A. We made a loan to Mr. Gomilla in October, 1884—October 10th, 1884.

122 Q. Of how much?

A. Five thousand dollars.

Q. What did they pledge to you for that loan?

A. Two mortgage notes of A. J. Gomilla for five thousand dollars each.

Q. When was the note paid?

A. On the 28th October, 1884.

Q. How much did he pay?

A. On the 28th of October, 1884, he paid three thousand dollars ($3,000.00) cash and renewed the note for a few days for the balance.

Q. Balance of two thousand dollars was extended?

A. Yes, sir; leaving the same collateral in my hands for the final payment of that balance.

Q. When did he pay the two thousand dollars?

A. On the fifth of November.

Q. Have you got the act of pledge?

A. No, sir.

Q. What has become of it?
A. The act of pledge was contained in the note itself.
Q. In the note for the loan?
A. Yes, sir; and it was consequently delivered up to him as part of the note itself.
Q. With whom were your transactions?
A. With Mr. Torrey, of the firm of Gomilla & Co.
Q. The whole transaction was with Mr. Torrey, of the firm of Gomilla & Co.?
123 A. Yes, sir.

By Mr. NIXON:

Q. Mr. Roach, are you entirely positive about the date on which the two thousand dollars was paid—that it was on the date of the maturity of the note?
A. Without having made any special reference to my books as to the date of payment, I think it was on the date of the maturity of the note.
Q. I would like you to make special reference and see if it was paid on 5th November?
A. Yes, sir; I will do so.

(Witness here withdrew, and after a delay of about twenty minutes returned.)

Q. Mr. Roach, have you examined the books of the bank and ascertained the day when the two thousand dollars ($2,000) was paid?
A. It was paid on the 5th of November.
Q. Was that the date of the maturity of the extended paper?
A. Yes, sir.
Q. I understood you to say that at first three thousand dollars was paid?
A. Yes, sir; on the 28th of October.
Q. And then it was that the remainder of the paper was extended to the 5th of November?
A. Yes, sir.
Q. And on that day the two thousand dollars ($2,000.00) was paid?
A. Yes, sir.
124 Q. And the two five-thousand-dollar mortgage notes remained in your hands until the 5th of November?
A. Yes, sir.
Q. And then you turned them over to whom?
A. Mr. Torrey.

Testimony of Charles Maduell for Complainants.

United States Circuit Court, Eastern District of Louisiana, Fifth Judicial Circuit. In Chancery.

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILLA *et als.*
} No. —.

Testimony taken before the Honl. E. R. Hunt, examiner, at the office of the clerk of the circuit court of the United States, New Orleans, La., January 2d, 1886.

Appearances: George L. Bright, Esq., for complainant; Wm. Grant, Esq., for Gurley; J. O. Nixon, Jr., Esq., for Parker.

125 Testimony of Charles Maduell, p. 2.

CHARLES MADUELL, Esq., sworn on behalf of complainants, says:

By Mr. BRIGHT:

Q. You are a book-keeper?
A. Yes, sir.
Q. How long have you been such?
A. I have been keeping books for about twenty-five years.
Q. You are a member of what firm?
A. I do business in my own name.
Q. But before this with what firm were you connected?
A. Avendano Brothers.
Q. You kept their books?
A. Yes, sir.
Q. For how long?
A. Twenty-five years.
Q. Mr. Maduell, if the firm of Gomilla & Co. on the eighth day of February, 1884, loaned and advanced eighteen thousand dollars ($18,000.00) to A. J. Gomilla what entries should appear in the books?
A. It should be in the cash books—a cash entry.
Q. In what book?
A. Cash book.
Q. Tell us the entries that should have been made.
A. If the money was rec'd by Mr. Gomilla it would be a cash entry in the cash book; if not——
126 Q. Don't tell me "if not."
A. I mean if it was not a cash entry—if it was an entry to the credit of Mr. Gomilla it would be entered in the journal book.
Q. And if Gomilla gave to Gomilla & Co. four mortgage notes for the money, what entries ought to have been made in the books relative to those four notes?
A. Well, it would be either in the cash book or journal explaining the transaction.

Q. Would it come in the "bills receivable" book?
A. Well, it would be charged to—credited to bills receivable.
Q. Would it be entered in the "bills receivable" book?
A. It should be.
Q. Now, look in the cash book of Gomilla & Co. and see whether the entry is there made of having paid in advance to him eighteen thousand dollars ($18,000.00).

By Mr. NIXON: I object to that question on the ground that the books of Gomilla & Co. are not admissible in evidence against Mr. Barker, one of the defendants in this case, and that consequently any testimony in regard to the books or about the books is not admissible in evidence as against Mr. Barker.

By Mr. GRANT: I make the same objection on behalf of Mr. Gurley.

(Here counsel repaired to his honor Judge Boarman (in chambers) and, the objection being submitted, the court ruled as follows:)

127 By the COURT: Let the evidence be taken subject to the objection of the defendants, and let any further objections to testimony to be taken in the future be noted by the examiner, and the decision upon them reserved for the court.

A. I have examined the books and find no entry made to that effect.

By Mr. NIXON: February, 1884, that you looked at?
A. Yes, sir; February, 1884.

By Mr. BRIGHT:

Q. Examine the bills receivable book and see whether or not the notes for eighteen thousand dollars are there entered.
A. I have examined the bills receivable book and there is no entry to that effect.
Q. Examine the cash book, of date 6th February, 1884, and of date the 11th of February, 1884, and of date the 20th February, 1884, and see whether the books show whether any moneys were rec'd from J. Ward Gurley, Jr.
A. I find, on the 6th of February, 1884, a credit to loan account check from J. Ward Gurley, Jr., $3,496.50; on the 11th of February, 1884, I found a credit to loan account from J. Ward Gurley, Jr., $1.498.50; and there is no entry on the 20th of February.
Q. Look at the account of J. Ward Gurley, Jr., and tell us what are the debits and credits on that account.

A. I find on the 20th of May credit to loan account of
128 $1,000.00; I find this entry in the cash book.

Q. Examine those books and ascertain whether any of those amounts have ever been paid to Mr. Gurley.
A. There is an entry on 3d of May of $566.65 paid to Mr. Gurley; there is no individual account of J. Ward Gurley, Jr., on the books.
Q. Examine the books and tell me how this money to the credit of Gurley was used.
A. That is very difficult to say; striking a balance on that day, it is very difficult to say what payments were made with that money.

Q. Well, examine the books and tell me how that money was used.

A. It's impossible for me to say; on the 6th of February cash is debited $24,537.19 and it is credited $35,427.20; so, therefore, it appears that they paid $10,890.01 more than they had in cash.

Q. Examine the check book of February 8, 1884, and see whether there is a check drawn there by Gomilla for the payment of this house.

A. There is only three checks in the cash book on the Union Bank—one for $100.00, one for $11.55, and one for $25.

Q. Examine check book of the State National Bank.

A. In the check — of the State National Bank there is no check on the 8th of February.

Q. Look on August 30, 1884, and find out what payments were made to the Teutonia Insurance Company.

A. There is a charge in the cash books, credited to the loan
129 account, $5,000.00 paid to Teutonia Insurance Company on the 30th day of August.

Q. Look on August 21, 1884, and see whether any money was borrowed from the Teutonia Insurance Co.

A. Yes, sir; that same am't from the Teutonia Insurance Company, $5,000.00, on the 21st of August, 1884.

Q. Look — September 3d, 1884, and see whether any money was borrowed from the Teutonia Insurance Company.

A. On the 3d of September, $5,000.00 was borrowed from that company.

Q. Look on October 10th, 1884, and see if it was paid to that company.

A. October 10, 1884, paid to the Teutonia Insurance Company $5,000.00.

Q. Look on sixth of November, 1884, and see whether Barker loaned $2,000.00 to Gomilla & Co.

A. There is no entry in Nov'r. The books stop on the 31st day of October. There are no entries in November.

Q. Look on 10th of November, 1884, and see whether Mr. Barker loaned to Gomilla & Co.

A. I make the same answer. There are no entries made in November. The books stop on the 31st of October. There are no entries, either in the journal or cash book, after the 31st day of October.

Q. Look on October 10th, 1884, and see whether Gomilla & Co. borrowed money from the State National Bank, and how much.

A. They borrowed from the State National Bank on the
130 10th of October, 1884, $5,000.00.

Q. Look in the book and see whether it appears any pledges were given to the bank.

A. "Rec'd from State National Bank on our note, at fifteen days' date, due October 28th, 1884." It does not appear from that that any collaterals were given.

Q. Ought it to appear anywhere in the books that pledges were given?

A. It is sometimes entered and sometimes not. It is a matter

optional with the book-keeper; but generally if you have collaterals that you give out you enter them in the bill book as you issue them, so as to know where they are.

Q. Look in the bill book and see whether the pledges were given to the bank.

A. No, sir; it does not appear.

Q. Does it appear that that loan was paid to the bank on the 28th October, 1884?

A. Yes, sir; $5,000.00.

Q. How was it paid?

A. Paid to the State National Bank five thousand dollars.

Q. How was the five thousand dollars paid?

A. Well; it is an entry in the cash book.

Q. Well, look.

A. Perhaps a check was given; I don't know; it was paid in a check for five thousand dollars ($5,000.)

Q. Look on the fifth November and see if anything was paid to the State National Bank.

131 A. The books stopped on the 31st of October; there is no entry after that date.

Q. Look on the 28th October.

A. Five thousand dollars; three thousand dollars cash and two thousand renewal.

Q. Find out on those books whether that renewal is there.

A. "Rec'd from the State National Bank two thousand dollars."

By Mr. NIXON:

Q. On what date?

A. 28th of October.

Q. Look for the account of Caleb B. Barker in the books.

A. There is no account with Caleb P. Barker in the books.

Q. Examine the real-estate account and tell us how it stands.

A. "Dr. June 15, '82. My residence $12,000
Cook property 1,000
36 lots Idaho spr'gs... 1,200
$17,200"

These entries occur on the statement made at the beginning of the books, showing assets of A. J. Gomilla. There is also an entry of July 1st, $50. I don't know what that is. Then, in 1883, "Feb'y 13th, $1,645 paid to Thomas Bragg, secretary."

"Cr."

May 13, '84, $566.65, which were paid to Mr. Gurley for sale of lots.

Q. Will you examine this exhibit marked No. 2, which is identified with Torrey's testimony, and state at what date it must have been made.

132 By Mr. GRANT: I object to that, as the opinion of the witness is not admissible in evidence; he can only testify to facts.

A. It would be very difficult to find out, Mr. Bright.

Q. Do your best; I want the latest date at which that could have been made.

A. It appears to have been made after the first and between the first and tenth of March, 1884.

Q. Examine that exhibit in connection with the books and state whether it corresponds with the books.

A. It cannot be examined correctly.

Cross-examination.

By Mr. NIXON:

Q. Mr. Maduell, in examining these books, you find it to be a fact that they extend no further than the 31st day of October?

A. That's all.

Q. They cease there?

A. Yes, sir; on the 31st of October.

Q. All of the books?

A. Yes, sir; all of the books.

Q. What knowledge had the Rio Grande Railroad Company of these mortgage notes having been pledged?

A. What is the question?

Q. Are you the agent of the Rio Grande Railroad Company here?

A. Yes, sir.

133 Q. Did you have any communications with Mr. A. J. Gomilla on the subject of this mortgage?

A. No, sir.

Q. You never did?

A. No, sir.

By Mr. GRANT:

Q. You don't know anything about this case at all?

A. I don't; nothing but what I see now.

Q. Nothing but what you find in the books or have been told?

A. Exactly.

By Mr. NIXON:

Q. Mr. Maduell, what induced you, then, to make an affidavit and to swear to the fact that this was a fraudulent mortgage? What induced you to swear to that? What induced you to swear that these mortgage notes were fraudulently issued?

A. What induced me to do what?

Q. In the original petition filed in this cause there is an affidavit annexed in which you swear, to the best of your knowledge and belief, that the allegations of the petition are true, and that the petitioner charges that these eighteen thousand dollars of mortgage notes was a fraudulent and fictitious mortgage. I ask you how you came to make an affidavit of that sort if you knew nothing at all about it?

A. By examining papers and documents that Mr. Bright had?

Q. What documents?

134 A. I can't state positively now what they were.

Q. Give me an idea what they were.

A. I have seen letters from Brownsville.

Q. From Brownsville?
A. Yes, sir.
Q. From whom?
A. I can't state.
Q. You can't state?
A. No, sir; I have seen them and Mr. Bright has shown me his papers and I examined them and I found that mortgage. I did make the affidavit because I was satisfied, from the best of my knowledge, that the mortgage was fraudulent.
Q. What were those facts on which you based your information?
A. I cannot recollect now.
Q. How long ago was this since you made that affidavit?
A. I don't know. I cannot tell.
Q. Was it not less than a year ago?
A. I can't tell.
Q. Was it not on the 8th of April, 1885?
A. I could not tell you. I don't recollect.
Q. And that's the only answer that you can give, Mr. Maduell?
A. Yes, sir.
Q. This is a matter where you come into court and swear that to the best of your knowledge and belief this mortgage is a fraudulent mortgage, and you make very serious charges against gentlemen of this city, and now I ask you on what was that based?
135 A. I was satisfied that I was correct.
Q. I ask you what were the facts?
A. On the papers that I saw. I cannot state positively what they were now.
Q. Can you give me an idea of some one thing on which you relied?
A. No, sir; I cannot.
Q. You were fully authorized to act for the Rio Grande Railroad Company, were you not?
A. Yes, sir.
Q. Fully authorized?
A. Yes, sir; I was.

Testimony of Louis Avendaño and Larned Torrey for Plaintiff.

United States Circuit Court, Eastern District of Louisiana.

RIO GRANDE RAILROAD CO. *vs.* GOMILLA & CO. } No. —.

Testimony taken before the Hon. E. R. Hunt, examiner, in the office of the clerk of the circuit court of the United States, taken Saturday, January 16th, 1886.

136 Appearances: George L. Bright, Esq., for plaintiff; Rouse & Grant, for Gurley; J. Oscar Nixon, Jr., Esq., for Barker.

Test'y L. M. Avendano ---------- p. 5
Larned Torrey ---------- 8
Test'y taken Jan'y 23, '86 ---------- 13
Larned Torrey ---------- 14

By Mr. BRIGHT: Plaintiff offers and files in evidence the petition of the Rio Grande Railroad Co. *vs.* Gomilla & Co. and the acc't annexed to it, filed July 1st, 1884, in suit No. 10628.

Also the marshal's return of service on the petition and citation on Gomilla & Co. and Gomilla and Torrey, and the judgment rendered in the same suit on the fifth of January, 1885; also the exception filed in the suit on October 22, 1884, and the answer filed on the 17th of November, 1884.

By Mr. NIXON: Counsel for Mr. Barker objects to the introduction of this evidence, on the ground that it is a thing done between other parties, and that it is not admissible against Mr. Barker for
137 any other purpose than to show that such a suit was brought, and that such a judgment was rendered.

By Mr. BRIGHT: Plaintiff offers in evidence mortgage certificate, dated 20th Jan'y, 1885, now marked "Plaintiff's Exhibit B."

By Mr. NIXON: Counsel for Mr. Barker objects to the introduction of the mortgage certificate, so far as it contains the certificate of recordation of the judgment of the Rio Grande Railroad Co. against Gomilla & Co., on the ground that same was recorded after the recordation of the mortgage in controversy in this suit and after the date of the execution and acceptance by Barker of the notes described in his answer.

By Mr. BRIGHT: Plaintiff offers in evidence deed of sale of Gomilla, dated 7th Febr'y, 1884, marked "Plaintiff's Exhibit 'C.'"

Also mortgage of A. J. Gomilla to Gomilla & Co., dated Febr'y 8th, 1884, marked "D."

Also execution issued on the 22d Jan'y, 1885, and return of the marshal thereon, in suit No. 10628.

By Mr. NIXON: I object, on behalf of Mr. Barker, on the ground that it is immaterial and between third parties.

138 By Mr. BRIGHT: Plaintiff offers *alias* writ of execution issued in the same suit on the 8th April, 1885, and return of the marshal thereon.

By Mr. NIXON: I make the same objection on behalf of Mr. Barker, and the further objection that the marshal's return is not proof of the facts set out therein as against Mr. Barker.

By Mr. BRIGHT: Plaintiff offers in evidence letter of Gomilla & Co. to A. Wersbreski, president of the Rio Grande R. R. Co., dated 9th June, 1881, now marked Exhibit "E."

By Mr. NIXON: Counsel for Barker objects to the introduction of the evidence on the ground, first, that it is immaterial and between third parties; second, that the letter is not admissible to prove any facts stated therein.

By Mr. BRIGHT: Plaintiff offers in evidence protest of drafts now marked T. & G., H. N. & J.

LOUIS N. AVENDANO, sworn for plaintiff, says:

Direct examination by Mr. BRIGHT:

Q. Look at these drafts marked Exhibits F, G, & H and state whether you had them in your possession.

139 A. Yes, sir; these here were presented by me to Mr. Gomilla and protested for non-acceptance, and then protested for non-payment.

Q. Did you have any conversation with Mr. Gomilla about them?

A. Yes, sir.

Q. About what time? Give the dates.

A. Soon after these were protested and for many months after they were protested we talked many times about the matter.

By Mr. GRANT:

Q. Was Mr. Barker or Mr. Gurley present at those conversations?

A. No, sir; they were between Mr. Gomilla and me.

By Mr. GRANT: Counsel for defendants object to the introduction of evidence of any conversation between witness and Mr. Gomilla out of the presence of these two defendants, on the ground that declarations made by Mr. Gomilla out of the presence of the defendants cannot bind them.

By Mr. BRIGHT:

Q. What did he say about the payment of these drafts?

A. He said that he was unable to pay them; that if these acceptances were brought at any time in court he would confess judgment at once, and that he could not deny it, inasmuch as he had rendered an ac. current between himself, the house of Gomilla & Co., & the R. R. Co., and in that account current his indebtedness

140 was established.

Q. What was his standing at that time, as to monetary credit and business standing in this community?

A. I do not know.

Q. What was his ability to pay his debts?

A. He told me that he was able to pay.

Q. Told you what?

A. That he was in a condition to pay, but that he would never pay; that there was something in this matter of a private character which prevented him from paying; what it was I do not know.

No cross-examination.

LARNED TORREY, recalled, says:

By Mr. BRIGHT:

Q. Look at this document marked Exhibit A. Have you ever seen it before? And tell me whether you ever saw the original, and whether the original was in your handwriting.

A. I have seen this document before. I do not know whether the original was in my handwriting or not. I am inclined to think that it was not.

Q. Mr. Torrey, please produce the copy book of Gomilla & Co.

A. I have not got it here.

NOTE.—Mr. Torrey is requested to produce it on next Sat-

141 urday, at 12 o'clock m.

By Mr. BRIGHT:

Q. Did you ever see the original, Mr. Torrey?

A. I do not remember.

Q. To the best of your opinion, does that copy come from Gomilla & Co.?

A. I presume that the party who drew up that document must have got the information from the books of Gomilla & Co.

Q. Mr. Torrey, Exhibit "A" purports to be copy of an original that I want in evidence. Is it in your power to furnish the evidence that it is a copy of an original which was issued by Gomilla & Co.?

A. I can prove some of these amounts. I do not know whether they are all correct or not.

Q. Was Mr. M. J. Gomilla a brother of A. J. Gomilla?

A. Yes, sir.

Q. Was he authorized in Brownsville, Texas, to make settlements for Gomilla & Co.?

A. I do not remember that.

Q. Did he not try to make any?

A. I think that he did.

Q. Did the firm of Gomilla & Co. furnish him with any information or documents to effect settlements at Brownsville?

A. I presume that they did.

Q. What information or documents did they furnish him with?

A. I do not know.

142 Q. Did M. J. Gomilla write back to the firm of Gomilla & Co. the results of his endeavors?

A. I do not know positively, but I presume that he did.

By Mr. BRIGHT: You are requested on next Saturday, at 12 o'clock, to produce his letters.

Q. What time was this that Gomilla, in Brownsville, was instructed to make settlements?

A. I do not know that; you say that it was in March.

Q. Of what year?

A. You say that it was 1884; I presume it was about that time.

Q. You use the words "I presume it was about that time;" can you give us any more definite and certain answer?

A. No, sir; I do not know that I can without referring to the letters, etc.

By Mr. BRIGHT: You are requested to refer to those letters and give proper answer on next Saturday, at 12 o'clock.

Q. Have you a copy book for January, February, & March, 1884?

A. Yes, sir.

Q. You are requested to produce it on next Saturday, at 12 o'clock.

United States Circuit Court, Eastern District of Louisiana.

143 RIO GRANDE RAILROAD CO. vs. GOMILLA & CO. } No. —.

Testimony taken before the Hon. E. R. Hunt, examiner, in the office of the clerk of the circuit court of the United States, taken Saturday, Jan'y 23d, 1886.

Appearances: George L. Bright, Esq., for plaintiff; Rouse & Grant, for Gurley; J. Oscar Nixon, Jr., Esq., for Barker.

LARNED TORREY recalled.

By Mr. BRIGHT:

Q. Mr. Torrey, have you got the copy book of Gomilla & Co. which you were requested to produce to-day?

A. Yes, sir.

Q. Have you found a copy of that document marked Exhibit A?

A. No, sir; it is not in the book.

Q. This is the letter book?

A. Yes, sir.

144 Q. Have you another letter book of that kind?

A. Those are the Mexican letters and documents of that sort which were sent to that section of the country; they were all copied in this book.

Q. Have you any other copy book used at that time than the one that you produce now?

A. Yes, sir; there are other copy books, but the document referred to is not in either one of them.

Q. How many have you?

A. Five or six.

Q. Have you examined them all?

A. Yes, sir.

Q. You do not find it copied in this book?

A. No, sir.

Q. Or in any of the others?

A. No, sir.

Q. You have not produced any copying book except this one which you now find before you?

A. Yes, sir; that is all.

By Mr. GURLEY:

Q. What do you need?

A. This is the letter book that we use for our Mexican correspondence that was sent to that section of the country, Brownsville, Matamoras, and other places; all of them were copied in this book. It is labeled "Mexican correspondence;" you will see it on the book.

145 Q. Have you produced the letters of M. J. Gomilla giving the results of his endeavors?

Witness does not produce the letters which he was requested to produce, of M. J. Gomilla to A. J. Gomilla & Co., relative to his endeavors in making settlements at Brownsville.

By Mr. GURLEY: Why did you not produce them?

A. Because I cannot find any such correspondence. M. J. Gomilla was an invalid at that time, and I do not know that he wrote any letters.

By Mr. BRIGHT:

Q. Did Gomilla & Co. write any letters to him?

A. Yes, sir; there are some letters here relative to the defendants in Brownsville, Texas. I do not see any such letters as are asked for; you can look through yourself. Here is a letter to M. J. Gomilla, dated July 26, 1884. Here is another letter to A. Wersbriski, of the Rio Grande R. R. Co., dated 2d July, 1884.

Q. Mr. Torrey, who is Mrs. B. H. Bullet, of Indiana?

A. I do not know, sir.

Q. Hey?

A. I do not know, sir.

Q. Mr. Torrey, did not Mr. Gomilla make a transfer of his furniture and other personal property to anybody?

A. I do not know anything about it.

146 Q. Did he not make such a transfer to Camors?

A. I do not know.

Q. Did not Gomilla & Co. permit judgment rendered in their favor against Keelor Bros. & Millican to be attached by Breedlove Smith?

A. I did not know that Breedlove Smith had attached a judgment of that kind.

Q. Didn't you and Gomilla, or either of you, get him to do it?

A. No, sir; I did not do it.

Q. Did not Gomilla get him to do it?

A. I do not know that he did.

Q. What aid did you and Gomilla give Breedlove Smith in this attachment suit?

A. None at all that I know of.

Q. Did not you and Gomilla confess judgment before Hero, notary public?

A. I know that I did not; Mr. Gomilla himself may have done so.

Q. Was not Breedlove Smith a clerk of Gomilla & Co.?

A. Breedlove Smith?

Q. Yes.

A. No.

Q. What business relations did he have with them?

A. Transacted all our business in St. Louis.

Q. And when in New Orleans what did he do for you?

A. When in New Orleans?

Q. Yes; before he went to St. Louis.

147 A. He was a clerk for Gordon & Gomilla.

Q. Gordon & Gomilla was composed of Gordon & A. J. Gomilla?

A. Yes, sir.
Q. He was a clerk of Gordon & Gomilla?
A. Yes, sir; he was Gordon & Gomilla's clerk.
Q. Was he ever a clerk for Gomilla & Co.?
A. No, sir.
Q. Do you not know that he attached the property of Gomilla & Co.?
A. I heard that he had attached that judgment.
Q. You heard so?
A. Yes, sir.
Q. You do not — it of your own knowledge?
A. Well, he told me so.

By Mr. NIXON: We object, on the part of Mr. Barker, to anything that was told Mr. Torrey outside of the presence of Mr. Barker.

By Mr. BRIGHT:

Q. You did not help him?
A. No, sir; I did not.
Q. You did not help him to attach that thing?
A. I had nothing to do with it that I know of particularly. I may have signed the name of Gomilla & Co.
Q. To what?
148 A. I do not know; I may have used the name of Gomilla & Co.
Q. You had no conversation with Breedlove Smith to induce him to make the attachment?
A. No, sir.
Q. Did he not make the attachment and judgment was rendered?
A. I do not know that he did or not.
Q. Did you make any defense to that attachment?
A. I think not.
Q. Did you permit judgment to go against you?

By Mr. NIXON: I object on the ground that the best evidence of the judgment against Gomilla & Co. would be a certified copy of the transcript.

By Mr. BRIGHT:

Q. Did you permit judgment to go against you without defense?
A. I do not know anything about it; I had nothing to do with it. Mr. Gomilla transacted the business, if there was any such business.
Q. Tell me all you know about that transaction and about that judgment of Breedlove Smith.
A. I know that we had a judgment against Millican and against Keeler, and I know that Breedlove Smith attached it.
Q. Is that all that you know?
A. Yes, sir; that is all.
Q. Ain't it to your knowledge, Mr. Torrey, that Mr. Gomilla transferred his furniture and other effects to Camors?
149 A. No, sir.
Q. Hey?

A. No, sir.
Q. Don't you live at Gomilla's house?
A. Yes, sir.
Q. You lived there when that furniture was his?
A. Yes, sir.
Q. And you never knew of any transfer?
A. I never knew of any transfer to Mr. Camors.
Q. Or anybody else?
A. No, sir.
Q. Gomilla remained in possession of the furniture all that time?
A. Yes, sir; and every thing is in his house—all of his furniture that I know of.
Q. Did he never part with the possession of it?
A. The furniture is still in the house.
Q. After the transfer, did you never know him to part with the possession of it?
A. I never knew anything about; it did not interest me. It was none of my business.
Q. And you were living in the house?
A. No, sir; not at that time.
Q. What time do you mean?
A. The time that you speak of.
Q. What time do I speak of?
150 A. While he lived, I suppose.
Q. You do not know that it was seized by the marshal?
A. Yes, sir; I heard him say that the marshal had seized it.
Q. You do not know that when it was seized Camors claimed it as his own?
A. No, sir.
Q. How long have you been living at the house of Mr. Gomilla?
A. Since the 11th of Sept.
By Mr. NIXON: What year?
A. 1885.

By Mr. BRIGHT:

Q. Do you know of any transfers whatever made by Gomilla of his rights, credits, or property?

By Mr. NIXON: I object on the ground that it is irrelevant to the inquiry now being made.

By Mr. BRIGHT:

Q. Do you know of any transfer whatever made by Gomilla of his rights and credits, made at the same time as the mortgage, the subject of this suit?
A. No.
No cross-examination.

151 By Mr. BRIGHT: I offer in evidence the petition filed in the suit of Mrs. B. H. Bullett against P. S. Wiltz, Jr., No. 11210 of the docket of this court.
By Mr. GRANT: We object as irrelevant.

By Mr. NIXON: I object on the same ground; and, further, that this is a transaction between parties not parties to this suit and whose action cannot bind or affect Mr. Barker.

Sale of Property of the Hibernia Insurance Company of N. Orleans to A. J. Gomilla, Marked Exhibit "C" and Annexed to Testimony.

No. 12891.

STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

7TH FEB'Y, 1884.

Sale of Property. Hibernia Ins. Co. to A. J. Gomila.

152 Be it known that on this seventh day of February, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and eighth, before me, William Joseph Castell, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Mr. John Henderson, of this city, herein acting in his quality of president of the Hibernia Insurance Company of New Orleans, a duly incorporated institution domiciled in this city, and also herein acting under and by virtue of the authority in him vested by a general resolution of the board of directors of said company, a duly certified copy whereof is annexed to an act of sale passed in this office on the 22d May, 1883, who declared that, acting as aforesaid and for the price and sum hereinafter expressed, he does by these presents grant, bargain, sell, convey, transfer, assign, and set over, with a full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other incumbrances whatsoever, unto Mr. Anthony James Gomila, also of this city, present, accepting, and purchasing for himself, his heirs and assigns, and acknowledging due delivery and possession thereof, a certain portion of ground situate, lying, and being in the sixth dis-
153 trict of this city, in the square bounded by Nayades or St. Charles, Edmund or Calhoun, and St. Patrick streets and Henry Clay avenue, designated by the letter A on a sketch made by J. A. d'Hémécourt, deputy city surveyor, on the ninth day of July, 1872, annexed for reference to an act of sale by L. A. Burthe to Mrs. Robert O. Butler, passed in the office of James Fahey, a notary public, in this city, on the twenty-sixth day of October, 1872, according to which sketch said portion of ground measures in American measure one hundred and sixty-nine feet front on Nayades or St. Charles street, one hundred and fifty-six feet three inches front on St. Patrick street, three hundred and sixty-six feet five inches four lines in depth and front on Henry Clay avenue, and three hundred and twenty-five feet nine inches one line in depth on the line which divides it from the portion of ground designated by the

letter B on said sketch, and said portion A forms the corner of St. Charles street and Henry Clay avenue, and said above-described portions, A and B, form the whole of that certain square of ground which is designated by the number ninety on a plan drawn by Nemigger, surveyor, on the 24th of January, 1854, deposited for reference in the office of Achille Chiapella, late a notary public, in this city, and the portion marked A, herein conveyed, forms the half towards Henry Clay avenue of the above square No. ninety, together with all the buildings and improvements thereon, rights, ways, and advantages thereunto belonging or in anywise appertaining,
154 being the same property which said corporation, vendor, acquired by purchase from Mrs. Emma D. Casey by an act passed in this office under date of the first of August, 1878; to have and to hold the said property and appurtenances unto the said purchaser, his heirs and assigns, forever; and the said vendor the said property and appurtenances herein conveyed to the said purchaser, his heirs and assigns, shall and will warrant and forever defend against all legal claims and demands whatsoever. And the said vendor, by its said president, moreover transfers unto the said purchaser all and singular the rights and actions of warranty to which it is or may be entitled against any and all of the former owners of the property herein conveyed, hereby subrogating to said purchaser in and to the said rights and actions, to be by him enjoyed and exercised in the same manner as they might have been by the said corporation, vendor, itself.

This sale is made and accepted for and in consideration of the price and sum of ten thousand dollars ($10,000.00), which amount said purchaser has presently paid in ready current money unto said John Henderson, president of said Hibernia Insurance Company, who hereby acknowledges receipt thereof and grants full acquittance and discharge therefor in his aforesaid capacity.

By reference to the annexed certificate from the register of conveyances in and for this parish, dated the 5th instant, said corporation, vendor, does not appear to have heretofore alienated said aforedescribed property, and by reference to the annexed certificate from the recorder of mortgages in and for this parish, dated the 4th
155 instant, there appear to be no other mortgages standing in the name of said corporation, vendor, recorded against the property herein coveyed than the draining privilege; one mortgage, State taxes 1882, assessed at $8,000, and one mortgage, State taxes 1883, assessed at $8,000, all of which are paid and which said corporation binds itself to have erased and cancelled.

The said purchaser hereby assumes and binds himself to pay to the acquittance of said corporation the taxes due and exigible in 1884; and the said purchaser furthermore declares that he has paid all taxes previous to 1884 on said property.

Thus done and passed, in my office, at New Orleans aforesaid, the day, month, and year first above written, in the presence of James J. Woulfe and Buissiere Rouen, witnesses of lawful age, domiciliated

in this city, who hereunto sign their names with the parties and me, the said notary, after the reading of these presents.

(Original signed) JOHN HENDERSON, *President.*
" " A. J. GOMILA.
" " JAS. J. WOULFE.
" " BUS. ROUEN.
" " W. J. CASTELL, *Not. Pub.*

Registered in the conveyance office, Book 118, fo. 418, and duly stamped.

New Orleans, February 8th, 1884.

[Seal of Register of Conveyances.]

(Signed) R. D. HUBBARD, *D'y R. C.*

156 STATE OF LOUISIANA, *City of New Orleans:*

I hereby certify the above and foregoing to be a true and correct copy of the original act on file and of record in the archives of my office.

In faith whereof I hereunto set my hand and affix my seal of office on this 22d day of December, A. D. 1885.

[SEAL.] (Signed) M. VOORHIES,
Custodian Notarial Records.

Mortgage of A. J. Gomila to Gomila & Co., Marked Exhibit "D" and Annexed to Testimony.

No. 17.

FEBRUARY 8, 1884.

Mortgage. A. J. Gomila to Gomila & Co.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

157 Be it known that on this eighth day of February, in the year eighteen hundred and eighty-four, before me, Samuel Flower, a notary public in and for the city of New Orleans, parish of Orleans, State of Louisiana, aforesaid, duly commissioned and qualified, and in presence of the witnesses hereinafter named and undersigned, personally came and appeared Mr. Anthony James Gomila, of the city of New Orleans, which said appearer declared and acknowledged that he is justly and truly indebted unto the commercial firm of Gomila & Co., composed of said A. J. Gomila and Larned Torrey, of this city, and herein represented by the said partner, Larned Torrey, in the full sum of eighteen thousand dollars ($18,000.00), amount loaned and advanced to him in ready current money by the said firm, for the reimbursement whereof he has furnished his four promissory notes—three for the sum of five thousand dollars each and one for the sum of three thousand dollars—drawn and subscribed by him, the said A. J. Gomila, to the order of and endorsed by himself, dated the date hereof, made payable, to

wit, the three notes of five thousand dollars each, respectively, one, two, and three years after date, and the note for three thousand dollars payable three years after date, and stipulating to bear interest at the rate of eight per cent. per annum from date until paid.

Now, in order to secure, in capital and interest, the full and final payment of the said herein-furnished promissory notes (which notes after having been by me, notary, duly paraphed "*ne varietur*" in order to identify the same herewith, have been delivered
158 unto the said L. Torrey, who is also here present, acknowledging the receipt thereof and accepting these presents) for and in behalf of his said firm, the said Anthony J. Gomila did further declare that he does by these presents specially mortgage and hypothecate unto the said Gomila & Co. and such person or persons who may eventually be the holder or holders of the said herein-furnished promissory notes all and singular the following-described property, to wit:

A certain portion of ground situate, lying, and being in the sixth district of this city, in the square bounded by Nayades or St. Charles, Edmund or Calhoun, and St. Patrick streets and Henry Clay avenue, designated by the letter A on a sketch by J. A. d'Hémécourt, deputy city surveyor, on the 9th day of July, 1872, annexed for reference to an act of sale by L. A. Burthe to Mrs. Robert O. Butler, passed in the office of James Fahey, a notary public, in this city, on the twenty-sixth day of October, 1872, according to which sketch said portion of ground measures in American measure one hundred and sixty-nine feet front on Nayades or St. Charles street, three hundred and sixty-six feet five inches four lines in depth and front on Henry Clay avenue, and three hundred and twenty-five feet nine inches and one line in depth on the line which divides it from the portion of ground designated by the letter B on said sketch, and said portion A forms the corner of St. Charles street and Henry Clay avenue, and said above-described portions, "A" and "B," form the whole of that certain square of ground which is designated by the number "ninety" on a plan drawn by Nomigger, surveyor, on the 24th day of January, 1854, de-
159 posited for reference in the office of Achille Chiapella, late a notary public, in this city, and the said portion marked "A," herein mortgaged, forms the half toward Henry Clay avenue of the above square No. ninety, together with all the buildings and improvements thereon, rights, ways, and advantages thereunto belonging or in anywise appertaining, being the same property which was acquired by the said A. J. Gomila by purchase from the Hibernia Insurance Company of this city, as per act passed before W. J. Castell, notary public, on the seventh day of the present month and year, the said property so to remain mortgaged and hypothecated until the full and final payment of the aforesaid promissory notes in capital and interest, the said A. J. Gomila hereby binding himself and his heirs not to sell, alienate, mortgage, or encumber the same to the prejudice of these presents.

And the said Anthony J. Gomila further declared that he does by these presents bind and obligate himself and his heirs to cause

all and singular the buildings and improvements on the property aforedescribed to be insured and kept insured against the risks of fire by one of the good and solvent insurance companies up to the full amount and until the full and final payment of said aforedescribed promissory notes in capital and interest, and to transfer and deliver, until then, unto the said mortgagee or any other holder or holders of said promissory notes the policy or policies of
160 such insurance or insurances, in default whereof said mortgagee and any and all such holder or holders of said promissory notes is and are hereby authorized to cause such insurance or insurances to be made and effected at the cost, charge, and expense of said mortgagor, who shall refund and reimburse to them all premiums of insurance so paid or advanced on his default.

And the said A. J. Gomila further declares that he does by these presents consent, agree, and stipulate that, in event of the said promissory notes not being punctually paid at their respective maturity, it shall be lawful for, and he does hereby authorize, the said mortgagee or any other holder or holders thereof to cause all and singular the said hereinbefore-described and herein-mortgaged property to be seized and sold under executory process (issued by any competent court), without appraisement, to the highest bidder, payable cash, hereby expressly dispensing with all and every appraisement thereof and by these presents waiving and renouncing the benefit of appraisement and of laws or parts of laws relative to the appraisement of movable or immovable effects, etc., seized and sold under executory or other legal process, hereby confessing judgment in favor of said mortgagee and such person or persons who may be holder or holders of said promissory notes for the full amount thereof, capital and interest, together with all premiums of insurance, attorney's fee, and legal costs and charges herein stipulated.

And the said A. J. Gomila further declared that he does by these presents bind and obligate himself and his heirs to pay and reimburse unto the said mortgagee and such person or persons
161 who may be the holder or holders of said promissory notes all such lawyer's or attorney's fees, together with all such costs, charges, and expenses as said mortgagee or any such holder or holders shall or may incur or pay, in the event of the non-payment of said promissory notes at maturity, said attorney's fees, however, to be fixed at five per cent. on the amount sued for.

Now, to secure the faithful performance of the foregoing obligations and the reimbursement and payment of the said lawyer's or attorney's fees, charges, and expenses aforesaid, and the reimbursement and payment of all premium or premiums as shall be paid by said mortgagee or any other holder or holders of the aforesaid promissory notes in causing insurance to be effected on the default of the mortgagor as aforesaid, the said Gomila does by these presents further specially mortgage and hypothecate the hereinbefore-described property unto and in favor of said mortgagee and holder or holders of said promissory notes.

The said mortgagor declares that all State and city taxes on the above-described property exigible against the above-described prop-

erty to date have been paid, with which declaration the said Torrey, on behalf of his said firm, the mortgagee herein, expresses himself satisfied and relieves me, notary, from all liability or responsibility for the non-production of the tax receipts, as also for the non-production of a mortgage certificate, which is likewise waived by all parties hereto.

Thus done and passed in my office, at the city of New
162 Orleans, on the day, month, and year herein first above written, in the presence of Messieurs Thomas J. Keane and Joseph J. Stooper, competent witnesses, who hereunto signed their names,t ogether with the said parties and me, the said notary, after reading the foregoing.

(Original signed) A. J. GOMILA.
" " GOMILA & CO.,
" " Per L TORREY.
" " T. J. KEANE.
" " JOS. J. STOOPER.
" " SAM'L FLOWER,
Notary Public.

Recorded in the mortgage office, Book 273, folio 353.
New Orleans, February eighteenth, 1884.
[Seal of Recorder of Mortgages.]
(Signed) H. A. ANTZ, *Clk.*
" GEO. GUINAULT, *D'y R.*

STATE OF LOUISIANA, *City of New Orleans:*

I hereby certify the above and foregoing to be a true and correct copy of the original act on file and of record in the archives of my office.

In faith whereof I hereunto set my hand and affix my seal of office on this the 31st day of December, A. D. 1885.

[SEAL.] (Signed) M. VOORHIES,
Custodian Notarial Records.

163 *Letter of Gomila & Co., Marked Exhibit "E," Annexed to Testimony.*

NEW ORLEANS, *9th June*, 1884.

A. Werbiski, Esq., pres't Rio Grande Railroad Co., Brownsville, Texas.

DEAR SIR: In reply to your valued favor of 2nd inst. we beg to say that our other creditors have agreed to accept in settlement our notes at 1, 2, & 3 years for equal amounts, subject to your accepting the same conditions as proposed to you through Mr. M. J. Gomila some time since. We had at first proposed 12, 18, & 24 months, but the delay in acting on our proposition and the publicity given our difficulties by your New Orleans correspondents forced an unfavorable change in our affairs. We may add, that further delay in accepting our proposition can only do harm to the general interest, and unless there is some speedy decision we are advised by our

friends to give up and start in some other name without further delay. We appreciate and understand the difficulties your board has had in arriving at a prompt decision, but at the same time we look upon you as interested in our situation, and we are bound to tell you that the delay has been expensive and injurious. We have a hard contract to work out, and when we look at our resources wasting away we sometimes feel less hopeful. You must judge for yourselves what you wish to do, but if you intend
164 to give us an extension, your own interest should be to give it without further delay.

Very respectfully,

(Signed) GOMILA & CO.

Draft, Annexed to Testimony.

$2,200.00. BROWNSVILLE, TEXAS, *Dec'ber* 31, 1883.

At sight, three days, pay to the order of F. San Roman, Esq., twenty-two hundred $\frac{00}{100}$ dollars, value received, and charge the same to account of—

No. 366. M. J. GOMILA, *Rec'r.*

To Mess. Gomila & Co., New Orleans, La.

Endorsed on face: Protested for non-acceptance. Fee, $3.50. New Orleans, January 12, 1884. Jas. Fahey, notary public.

Endorsed on back: Pay to the order of José San Roman,
165 Sob's. F. San Roman. Pay to the order of Avendano Brothers. José San Roman, Sob's. No. 6293.

Protest, Marked "I," Annexed to Testimony.

[James Fahey, No. 162 Common St., Notary Public for Union National Bank and Mutual National Bank.]

STATE OF LOUISIANA, }
City of New Orleans. }

By this public instrument of protest be it known that on this eighteenth day of January, in the year one thousand eight hundred and eighty-four, at the request of Messrs. Avendano Brothers, of this city, holders of the original draft, whereof a true copy is on the reverse hereof written, I, James Fahey, a notary public in and for the parish of Orleans, State of Louisiana, aforesaid, duly commissioned and qualified, residing in the city of New Orleans, by my
166 deputy, Michel V. Dejan, presented said draft to A. J. Gomilla, of the firm of ——, the drawees thereof, at their office, in this city, and demanding of him payment therefor, was refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interest suffered or to be suffered for want of payment of the said draft.

Thus done and protested in the presence of Michel V. Dejan and Michel V. Abas, witnesses.

In testimony whereof I grant these presents under my [SEAL.] signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

(Signed) JAS. FAHEY,
Notary Public.

$2,200.00. BROWNSVILLE, TEXAS, *Dec'ber* 31, 1882.

At three days' sight pay to the order of F. San Roman, Esq., twenty-two hundred $\frac{00}{100}$ dollars, value received, and charge the same to account of—

No. 366. M. J. GOMILA, *Rec'r.*

To Messrs. Gomila & Co., New Orleans, La.

(Endorsed:) Pay to the order of José San Roman, Sob's.
167 F. San Roman. Pay to the order of Avendano Brothers. José San Roman, Sob's.

[On margin.]

Protested for non-acceptance.
Fees, $3\frac{50}{100}$ dollars.
New Orleans, January 12, 1884.

JAS. FAHEY,
Notary Public.

[On margin:] "Twenty-two hundred dollars."

Draft and Protest, Marked Exhibit "H," Annexed to Testimony.

($8,000.00.) BROWNSVILLE, TEXAS, *December* 31, 1883.

At three days' sight pay to the order of Simon Celaye, Esq., eight thousand $\frac{00}{100}$ dollars, value received, and charge the same to account of—

No. 365. M. J. GOMILA, *Rec'r.*

To Mess. Gomila & Co., New Orleans, La.

Endorsed across face: Protested for non-acceptance. Fees, 3.50 dollars. New Orleans, January 12, 1884. Jas. Fahey, not. pub.

Endorsed on back: Pay to the order of José San Roman,
168 Sob's. Simon Celaya. Pay to the order of Avendano Brothers. José San Roman, Sob's. No. 6292.

[On margin:] "Eight thousand dollars."

[James Fahey, No. 162 Common St., Notary Public for Union National Bank and Mutual National Bank.]

STATE OF LOUISIANA,
City of New Orleans.

By this public instrument of protest be it known that on this eighteenth day of January, in the year one thousand eight hundred

and eighty-four, at the request of Messrs. Avendano Brothers, of this city, holders of the original draft, whereof a true copy is on the reverse hereof written, I, James Fahey, a notary public in and for the parish of Orleans, State of Louisiana aforesaid, duly commissioned and qualified, residing in the city of New Orleans, by my deputy, Michel V. Dejan, presented said draft to A. J. Gomila, of the firm of ——, the drawees thereof, at their office, in this city, and demanding of him payment therefor, was refused.

Whereupon I, the said notary, at the request aforesaid, did
169 protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests suffered or to be suffered for want of payment of the said draft.

Thus done and protested in the presence of Michel V. Dejan and Michel V. Abat, witnesses.

In testimony whereof I grant these presents under my
[SEAL.] signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

(Signed) JAS. FAHEY,
Notary Public.

$8,000.00. BROWNSVILLE, TEXAS, *December* 31, 1883.

At three days' sight pay to the order of Simon Celaya, Esq., eight thousand dollars, value received, and charge the same to account of—

No. 365. M. J. GOMILA, *Rec'r.*

To Mess. Gomila & Co., New Orleans, La.

[On margin.]

Protested for non-acceptance.
Fees, $3\frac{50}{100}$ dollars.
New Orleans, January 12, 1884.

JAS. FAHEY, *Not. Pub.*

(Endorsed:) Pay to the order of José San Roman, Sob's. Simon Celaya. Pay to the order of Avendano Brothers. José San Roman, Sob's.

[On margin:] "Eight thousand dollars."

170 *Draft and Protest, Marked Exhibit "G," Annexed to Testimony.*

($700.00.) BROWNSVILLE, TEXAS, *Dec.* 31, 1883.

At sight pay to the order of F. San Roman, Esq., seven hundred $\frac{00}{100}$ dollars, value received, and charge the same to account of—

No. 368. M. J. GOMILA, *Rec'r.*

To Mess. Gomila & Co., New Orleans, La.

Endorsed: F. San Roman.

[On margin:] "Seven hundred dollars."

STATE OF LOUISIANA, *Parish of Orleans:*

By this public instrument of protest be it known that on this twenty-third day of January, in the year one thousand eight hundred and eighty-four, at the request of Messrs. Schmidt & Ziegler, of this city, holders of the original draft, whereof a true copy is on the reverse hereof written, I, Andrew Hero, Jr., a notary
171 public in and for the parish of Orleans, State of Louisiana aforesaid, duly commissioned and sworn, by my deputy, John J. Ward, presented said draft to Mr. Labat, a clerk in charge of the office of Gomila & Co., the drawees, at their said office, in this city, and demanded payment thereof, and was by him answered that the same would not be paid.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests suffered or to be suffered for want of payment of the said draft.

Thus done and protested in the presence of Messrs. John J. Ward and Achilles J. Ferran, both of this city, witnesses, who have signed with me, the notary.

(Original signed) JNO. J. WARD.
A. J. FERRAN.
ANDREW HERO, JR., *Not. Pub.*

A true copy of the original on file and of record in my notarial archives.

In testimony whereof I grant these presents under my
[SEAL.] signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

(Signed) ANDREW HERO, JR., *Not. Pub.*

172 $700.00. BROWNSVILLE, TEXAS, *Dec.* 31, 1883.

At sight pay to the order of F. San Roman, Esq., seven hundred dollars, value received, and charge the same to account of— M. J. GOMILA, *Rec.*

To Mess. Gomila & Co., La.

Endorsed: Seven hundred dollars. F. San Roman.

Draft and Protest, Marked Exhibit "F," Annexed to Testimony.

($11,763.84.) BROWNSVILLE, TEXAS, *Dec.* 31, 1883.

At three days' sight pay to the order of F. San Roman, Esq., eleven thousand seven hundred sixty-three $\frac{84}{100}$ dollars, value received, and charge the same to account of—

No. 370. M. J. GOMILA, *Rec.*

To Mess. Gomila & Co., New Orleans, La.

Endorsed on face: Protested for non-acceptance. Fees, 3.50 dollars. New Orleans, January 12, 1884. Jas. Fahey, not. pub.
173 Endorsed on back: Pay to the order of José San Roman, Sob's. F. San Roman.

Pay to the order of Avendano Brothers. José San Roman, Sob's. No. 6294.

[On margin:] "Eleven thousand seven hundred sixty-three $\frac{84}{100}$."

[James Fahey, No. 162 Common St., Notary Public for Union National Bank and Mutual National Bank.]

STATE OF LOUISIANA, }
City of New Orleans. }

By this public instrument of protest be it known that on this eighteenth day of January, in the year one thousand eight hundred and eighty-four, at the request of Messrs. Avendano Brothers, of this city, holders of the original draft, whereof a true copy is on the reverse hereof written, I, James Fahey, a notary public in and
174 for the parish of Orleans, State of Louisiana, aforesaid, duly commissioned and qualified, residing in the city of New Orleans, by my deputy, Michel V. Dejan, presented said draft to A. J. Gomila, of the firm of ——, the drawees thereof, at their office, in this city, and demanding of him payment therefor, was refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests suffered or to be suffered for want of payment of the said draft.

Thus done and protested in the presence of Michel V. Dejan and Michel V. Abat, witnesses.

In testimony whereof I grant these presents under my
[SEAL.] signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

(Signed) JAS. FAHEY,
Notary Public.

$11,763.84. BROWNSVILLE, TEXAS, *Dec.* 31, 1883.

At three days' sight pay to the order of F. San Roman, Esq., eleven thousand seven hundred sixty-three $\frac{84}{100}$ dollars, value received, and charge the same to account of—

No. 370. M. J. GOMILA, *Rec'r.*

To Mess. Gomila & Co., New Orleans, La.

[On margin.]

Protested for non-acceptance.
Fees, 3.50 dollars.
New Orleans, January 12, 1884.

JOS. FAHEY, *Not. Pub.*

175 (Endorsed:) Pay to the order of José San Roman, Sob's. F. San Roman. Pay to the order of Avendano Brothers. José San Roman, Sob's.

[On margin:] "Eleven thousand seven hundred sixty-three $\frac{84}{100}$."

Petition and Account. Filed July 1, 1884, *in Suit No.* 10628.

RIO GRANDE RAILROAD COMPANY *vs.* GOMILA & CO. } No. 10628.

To the circuit court of the United States for the 5th circuit and eastern district of Louisiana:

The petition of the Rio Grande Railroad Company, a corporation established under and by virtue of the laws of the State of Texas, and a citizen of Texas, shows that the commercial firm of Gomila & Co., composed of Anthony J. Gomila and Larned Torrey, residents of New Orleans and citizens of the State of Louisiana, are *in solido* indebted unto your petitioner in the sum of $26,731.97, twenty-six thousand seven hundred
176 and thirty-one dollars and 97 cents, with interest, at 5 per cent. per annum, from 1st January, 1884, until paid, for this, to wit, that M. J. Gomila, the receiver of the Rio Grande Railroad Company, acting for and in behalf of said railroad company, deposited at various times, for safe-keeping, with Gomila & Co. large sums of money between the 16 of July, 1883, and the 31 Dec'r, 1883, aggregating $31,094.61, and during said dates Gomila & Co. disbursed out of said sum the sum of $2,521.48, leaving a balance due to your petitioner, on the 1st Jan., 1884, of $28,573.13, as will appear by the account rendered to petitioner by Gomila & Co., hereto annexed and made a part of this petition.

Your petitioner shows that said Gomila & Co., since rendering said account, have paid the following drafts for and on account of your petitioner, viz:

One for----	$441 16
" " ----	400
" " ----	1,000
	1,841 16,

which, deducted from $28,573.13, leaves $26,731.97 still due to your petitioner, and which said Gomila & Co. acknowledge to owe to your petitioner and promised but neglect to pay.

Your petitioner shows that the aforesaid monies were deposited with the defendants, Gomila & Co., by M. J. Gomila, receiver of the Rio Grande Railroad Company, but since then the said M. J. Gomila, receiver, has been removed from the office of receiver and his appointment vacated and all things restored to the Rio Grande Railroad Company by the United States circuit court in and for the western district of Texas.

177 The premises considered, your petitioner prays that Gomila & Co. and Anthony J. Gomila and Larned Torrey be cited to answer this petition, and for judgment against them *in*

solido for $26,731.97, twenty-six thousand seven hundred and thirty-one dollars and 97 cents, with interest, at 5 per cent. per annum, from 1st January, 1884, until paid, and costs, and for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for Pl'ff.

July, 1884.

178 *Copy of Pencil Memorandum Attached to Account.*

Explanation:

Balance due M. J. Gomila, receiver, by Gomila & Co., Jan'y 1, '84, as per ac. current hereto annexed		$28,573 13
Less following drafts drawn by M. J. G., receiver, against Gomila & Co. and by them paid:		
#367, favor of F. San Roman	441 16	
#369, " " "	400 00	
#371, " M. J. G., agent	1,000 00	
		1,841 16
True bal. Jan'y 1, '84, U. S. currency		$26,731 97

Account Filed with Petition.

M. J. Gomila, receiver, in account current & interest account with Gomila & Co.

DR.

1883.					
July 10	To am't paid Francis Johnson, 1 carriage	5'00	175	8 75
18	To am't refunded Union B'k for d'ft on R. Moore, with protest fee	104 59	167	175 35
20	To am't erroneously credited M. J. Gomila, rec'r	156 00	165	257 40
Aug. 10	To sundry bills, Gimble & Frederickson	20 25	144	28 80
"	Invoice of this date	34 13	"	48 96
20	To paid bill of H. B. Stevens	62 00	134	83 08
24	To protested d'ft on H. Marquardt, & protest fee	494 74	130	643 50
29	To draft favor C. Trumpy	301 76	125	377 50
Sept. 7	To am't paid M. J. Gomila by Chas. H. Miller	105 00	116	121 80
8	To am't invoice of this date	38 92	115	44 85
17	" draft favor C. Trumpy	301 65	106	320 12
"	" " " Thomas Decker	162 45	106	171 72
27	" " " H. B. Stevens	35 00	96	33 60
"	" " " C. Trumpy	250 56	96	240 96
Oct. 8	" " " Whitney Iron Works Co.	143 35	85	121 55
"	" invoice of this date	37 08	85	31 45
18	" draft favor Thomas Decker	173 25	75	129 75
Dec. 15	" am't paid J. Garcia Martinez	10 00	17	1 70
21	" " " for " "	50 00	11	5 50
31	" invoice of this date	35 75	1	36
	" balance of numbers			42,160 67
	" balance	28,573 13		
		$31,094 61		45,007 37

179 CR.

1883.					
July 1	By balance	11,701 60	184	21,531 68	
16	By various checks, am't'g to 1,094.27 @ par	1,094 27	169	1,848 86	
24	By draft on H. Charnock	376 86	161	606 97	
"	" " " Ass't U. S. Treasurer	286 94	161	462 07	
25	" " " Woodward & Stillman $811				
"	" " " Fred. Probst & Co. 1,000				
		1,811 00	160	2,897 60	
Aug. 10	" " " Woodward & Stillman	2,280 50	144	3,284 64	
"	" " " P. Harmony Nephew	740 11	"	1,065 60	
21	" " " Wm. Spaekman, treasurer	6,000 00	133	7,980 00	
Sept. 8	By draft on Wm. Spaekman, treasurer, $1,005.76 @ 75 %	1,005 00	115	1,155 75	
27	By draft on Wm. Spaekman, treasurer, $2,338 @ 100 %	2,335 78	96	2,242 56	
Oct. 8	By draft on Schmidt & Zeigler	1,000 00	85	850 00	
"	" " " " "	500 00	"	425 00	
29	" " " Flast, Preston & Co.	655 65	64	419 84	
"	" " " " " " "	250 00	"	160 00	
"	" " " " " " "	120 00	"	78 80	
	Interest on numbers, 42,160.67	936 90			
		31,094 61		45,007 37	
1884.					
Jan'y 1	By balance	28,573 13			

E. E.
New Orleans, January 1st, 1884.

[Written across the face in blue pencil:] Examined and found correct. W. N. V.

180 *Citation. Issued to Gomila and Company and Anthony J. Gomila July 1st*, 1884.

UNITED STATES OF AMERICA,
Eastern District of Louisiana.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } No. 10628.

The President of the United States of America to Gomila and Company and Anthony J. Gomila, Greeting:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your

place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city
181 of New Orleans, this 1st day of July, A. D. one thousand eight hundred and eighty-four, and of the Independence of
[SEAL.] the United States of America the 108th year.

Teste:

(Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received July 2, 1884, by the U. S. marshal, and on July 2, 1884, I served a true copy of the within citation and the accompanying petition of pl't'ffs on the within-named Anthony J. Gomila individually and as a member of the commercial firm of Gomila & Co., defendants herein, by delivering the same to him in person and leaving the same in his hands, in the city of New Orleans.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By E. S. CURRY,
D'y U. S. Marshal.

Citation. Issued to Gomila and Company and Larned Torrey July 1st, 1884.

UNITED STATES OF AMERICA, }
Eastern District of Louisiana. }

182 Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY }
vs. } No. 10628.
GOMILA & CO. }

The President of the United States of America to Gomila and Company and Larned Torrey, Greeting:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city
[SEAL.] of New Orleans, this 1st day of July, A. D. one thousand eight hundred and eighty-four, and of the Independence of the United States of America the 108th year.

Teste:

(Signed) E. R. HUNT, *Clerk.*

183 *Marshal's Return.*

Received Jul. 2, 1884, by the U. S. marshal, and on July 3, 1884, I served a true copy of the within citation and the accompanying petition of pl't'ffs on the within-named Larned Torrey individually and as a member of the commercial firm of Gomila & Co., def'd'ts herein, by delivering the same to him in person and leaving the same in his hands, in the city of New Orleans.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By E. S. CURRY,
D'y U. S. Marshal.

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. November Term, 1884.

NEW ORLEANS, MONDAY, *January 5th*, 1885.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

184 RIO GRANDE RAILROAD COMPANY
vs.
GOMILA AND COMPANY. } No. 10628.

This cause came up for trial this day. Present: Geo. L. Bright, counsel for plaintiffs; J. Ward Gurley, Jr., counsel for defendant. The parties waived the jury and proceeded to trial before the court without a jury.

By reason of the evidence and the law it is ordered, adjudged, and decreed that the plaintiffs, The Rio Grande Railroad Company, do have and recover judgment against the defendants, Gomila & Co. and Anthony J. Gomila and Larned Torrey, *in solido*, for the sum of ($26,731.97) twenty-six thousand and seven hundred and thirty-one $\frac{97}{100}$ dollars, with interest, at five per cent. per annum, from 1st January, 1884, until paid, and costs.

Judgment rendered January 5th, 1885.

Judgment signed January 9th, 1885.

(Signed) EDWARD C. BILLINGS, *Judge.*

Exception. Filed Oct. 22, 1884.

185 Circuit Court of the United States for the 5th Circuit & Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & Co. } No. 10628.

Now come defendants and except to the action brought against them, and to the petition herein filed, for the reasons—

1st. Because the proper persons are not made parties plaintiff. The legally authorized parties, who alone can institute a suit in the name of the said corporation, the Rio Grande Railroad Company, are not joined in the action or even divulged in said petition.

2nd. Because it does not appear that this suit was ever authorized by the required resolution or other proper action of the duly empowered persons.

Wherefore defendants pray that this exception may be maintained, and that plaintiff's petition be dismissed at its cost.

(Signed) J. WARD GURLEY, JR.,
Att'y for Def'ts.

Answer. Filed November 17th, 1884.

U. S. Circuit Court, 5th Circuit & East. Dist. of Louisiana.

RIO GRANDE RAILROAD CO.
vs.
GOMILA & CO. } No. 10628.

186 Now come defendants herein and, for answer to plaintiff's petition, deny all and singular the allegations thereof, reserving all benefits of the exception herein filed.

Wherefore defendants pray that plaintiff's petition be dismissed with costs.

(Signed) J. WARD GURLEY, JR.,
Att'y for Def'ts.

The Mortgage Certificate Dated 20th Jan., 1885, *Marked Plaintiff's Exhibit B.*

STATE OF LOUISIANA, PARISH OF ORLEANS,
OFFICE OF RECORDER OF MORTGAGES.

The undersigned, recorder of mortgages for the parish of Orleans, State of Louisiana, certifies that in the records of this office there are no other mortgages standing in the name of Anthony J. Gomila and recorded against a certain portion of ground designated by the letter A on sq. bounded by St. Charles (Nayades), Edmond or Calhoun, and St. Patrick streets and Henry Clay avenue, and measures 169 ft. front on Nayades St., 366 ft. 5 4 l. in depth and
187 front on Henry Clay avenue, 325 9 i. 1 l. in depth on the line which divides it from the portion of ground designated as letter "B," than the drainage privilege; the mortgage he granted in favor of the firm of Gomila & Co., composed of A. J. Gomila and L. Torrey, &c., per act before Sam'l Flower, N. P., dated Feb'y 8th, 1884, to secure the sum of 18,000.00, int., &c.; one State tax 1884, ass'd for $10,000.00—

No. 10628.

—B'k 275, fo. 172, the gen'l one in favor of Rio Grande Railr'd Co., recorded on the 17th, resulting from a judgment by the Jan'y 18'

1885, 5th circ't court, on the 5th Jan'y, 1885, for the sum of $26,731 and 97 cents, with interest stipulated in said judgment and costs of suit against Gomila & Co.

9 a. m., New Orleans, Jan'y 17th, 1885.

[SEAL.] (Signed) JNO. GUINAULT, *R.*

Petition to Substitute, etc.

THE RIO GRANDE RAILROAD COMPANY. 11013. In Equity.

To the circuit court of the United States for the 5th circuit and eastern district of La.:

The petition of the complainant shows that the mortgage certificate offered in evidence in this cause by them on the trial of said cause has been mislaid or lost, and after due, diligent search cannot be found. The complainants pray that the ann'x'd mortgage certificate, which is a duplicate of the one mislaid or lost, be filed in lieu thereof.

(Signed) GEO. L. BRIGHT,
Solicitor for Complainant.

Order.

Let the annexed mortgage certificate, which is a duplicate of the one filed and offered in evidence on the trial of this cause, be filed in lieu thereof.

Sept. 8, 1886.

(Signed) EDWARD C. BILLINGS, *Judge.*

188 The deed of sale to Gomila, dated 7th Feb'y, 1884, marked Plaintiff's Exhibit C, copied at page 151 of this transcript.

The act of mortgage made by A. J. Gomila to Gomila & Co., dated Feb'y 8th, 1884, marked Exhibit D, copied at page 156 of this transcript.

The writ of execution issued on 22 Jan'y, 1885, and the return of the marshal thereon in suit No. 10628.

Fi. Fa. Issued 22 Jan'y, 1885.

10628.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Circuit, Holding Sessions in and for the Eastern District of Louisiana.

The President of the United States to the marshal of the eastern district of Louisiana or his lawful deputy, Greeting:

189 You are hereby commanded to demand from the defendants, Gomila & Co. and Anthony J. Gomila and Larned Torrey, *in solido* the sum of $26,731.97, twenty-six thousand seven hundred and thirty-one dollars and 97 cents, with interest, at five per

cent. per annum, from 1st January, 1884, until paid, and costs—clerk's costs, $35.15; att'y's fee, 10—cash, which the plaintiffs, The Rio Grande Railroad Company, lately recovered by judgment of the circuit court of the United States for the fifth circuit and eastern district of Louisiana; and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said defendants, Gomila & Co., Anthony J. Gomila, and Larned Torrey, *in solido* in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said defendants, Gomila & Co., Anthony J. Gomila, and Larned Torrey, *in solido* in your district, and that you have the moneys before our said court to render to the said plaintiffs for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22 day of Jan'y, [SEAL.] A. D. 1885, and 109 year of the Independence of the United States.

(Signed) E. R. HUNT, *Clerk.*

190 *Marshal's Return. Filed April* 1, 1885.

Received Jan. 22, 1885, by the U. S. marshal, and in obedience to written instructions from the attorney for plaintiffs I did seize the following: The claim made by Gomila & Company in the suit of Gomila & Co. *vs.* Culliford & Clark, in admiralty, No. 11965 of the docket of the hon. United States district court for the E. D. of La., and also the judgment rendered in said suit, now on appeal to the circuit court of the United States for the fifth circuit and eastern district of Louisiana, against Culliford and Clark, a firm composed of S. H. W. Culliford and John S. Clark, for $8,426.25, and the further sum of $934.12, auctioneer's charges, making altogether the sum of $9,360.97 damages, with 5% per annum interest from 30 June, 1883, until paid, and costs of suit, against Thomas D. Miller and Emile Carriere, as sureties on the release bond, *in solido* for the aforesaid judgment, interests, and costs; and of said seizure I notified, in writing, the defendants herein, Mess. Culliford & Clark and Thomas D. Miller and Emile Carriere, as will more fully appear by reference to the annexed notice of seizures and the returns thereon written, which are made a part of this return.

I also did, on the 25th February, 1885, seize the following: The claim made by Gomila & Co. against Culliford & Clark in suit No. 10965 of the district court of the United States for the eastern district of Louisiana and the judgment rendered in said suit against Culliford & Clark & *al.* for $9,360.97 and interest and costs, and appealed to the circuit court, and also the judgment rendered
191 by the circuit court of the United States for the fifth circuit and eastern district of Louisiana on appeal from the district court, which judgment was rendered against Culliford & Clark and others on 19th February, 1885, for $23,993.76, with 5% interest from

30 June, 1883, till paid, and costs, and all the right, title, and interest of Gomila & Co. in and to the suit of Gomila & Co. *vs.* Culliford & Clark and to the judgment rendered in said suit, and of said seizure I notified the defendants, through James McConnell, Esq., their attorney, and also by giving notice of said seizure — Messrs. De Wolf & Hammond, agents of the defendants, the whole as will more fully appear by reference to the annexed notice of seizure and the return thereon, marked "O" for reference. I also made general seizures by garnishee process and notices of seizures duly served in the hands of Thos. D. Miller and De Wolf & Hammond and Emile Carriere, garnishees, as will more fully appear by reference to the annexed notices of seizure and the return thereon written, marked X for reference. From said garnishee seizures nothing was as yet realized towards the satisfaction of this writ by the U. S. marshal, and, this writ expiring, I have made this return, requesting the clerk of this hon. court to furnish me with a copy thereof, together with all my proceedings thereon, in conformity to law, for the purpose of further proceedings if required. No other property found after due demand made of plaintiff's attorney and of the defendants under this writ.

Returned April 1st, 1885.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By E. S. WURZBURGER,
Deputy Marshal.

192 The *alias* writ of execution issued in same suit on 8th April, 1885, and the return of the marshal thereon:

Alias Writ of Fi. Fa. Issued 8 April, 1885.

Alias writ of *fieri facias.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Circuit, Holding Sessions in and for the Eastern District of Louisiana.

The President of the United States to the marshal of the eastern district of Louisiana or his lawful deputy, Greeting:

You are hereby commanded to demand from the defendants, Gomila & Co. and Anthony J. Gomila and Larned Torrey, *in solido* the sum of $26,731.97, twenty-six thousand seven hundred and thirty-one dollars and 97 cents, with interest, at five per cent. per annum, from 1st January, 1884, until paid, and costs—clerk's costs, $35.15; att'y's fee, $10—cash, which the plaintiffs, The Rio Grande Railroad Company, lately recovered by judgment of the circuit court
193 of the United States for the fifth circuit and eastern district of Louisiana; and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said defendants, Gomila & Co., Anthony J. Gomila, and Larned

Torrey, *in solido* in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said defendants, Gomila & Co., Anthony J. Gomila, and Larned Torrey, *in solido* in your district, and that you have these moneys before our said court to render to the said plaintiffs for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 8 day of April, A. [SEAL.] D. 1885, and 109 year of the Independence of the United States.

(Signed) E. R. HUNT, *Clerk.*

Marshal's Return. Filed June 16, 1885.

Received Apr. 8, 1885, by the U. S. marshal, and by virtue of the written requests of Geo. L. Bright, Esq., the attorney for plaintiff, I did seize, 1st, all the household furniture and other movable effects contained in the premises occupied by the defendant, A. Gomila, situated at the corner of Henry Clay avenue and St. Charles
194 street, in the city of New Orleans, and inventory was duly made of said movable effects, and the same is on file in this office. I also served the defendant with a copy of the said inventory and with notice of seizure in writing, which is evidenced by reference to the annexed document, marked A, and the return thereon written; said furniture was, after the legal delay had expired, advertised for sale; but previous to the day of said sale arriving the said furniture and movable effects were released from seizure by direction of plaintiff's attorney, which were also given in writing and are on file in this office; defendant, A. Gomila, having paid the costs created by reason of the said seizure of the movable effects to the U. S. marshal, amounting to the sum of fifty $\frac{00}{100}$ dollars, inclusive of keeping and advertising; the attorney for plaintiff having also directed the seizure of certain real estate occupied by the defendant, A. Gomila, situate in the 6th district of the city of New Orleans, being a portion of a certain square of ground bounded by St. Charles avenue, Edmond or Calhoun street, and St. Patrick street and Henry Clay avenue, forming the corner of St. Charles avenue and Henry Clay avenue, together with all the buildings and improvements thereon, said portion of ground being part of square No. 90 and is designated as fraction A of said square, as per plan deposited in the office of Achille Chiapella, late a notary public, a full description of which portion of ground, and particularly its measurement, is fully set forth in the annexed notice of seizure and the return thereon written; said notice of seizure is marked B for
195 reference and is made a part of this return. Of said seizure the defendant was notified in writing, and the said seizure was duly recorded in the office of recorder of mortgages for the parish of Orleans and city of New Orleans and in the seizure book of this office. By direction of plaintiff's attorney the following was also seized and

notice thereof given in writing to the defendants and to Theodore A. Beck and to Kehlor Brothers—John T. Milliken could not be found to be served with notice of seizure—to wit: 1st, the judgment rendered on the 27 day of June, 1883, by the civil district court for the parish of Orleans, division C, in favor of Gomila & Co. and against Jno. T. Milliken, for $6,200.00, with interest thereon, at the rate of 8 % per annum from 27 February, 1885, until paid, and costs of suit, with special lien and privilege on all of the property, credits, rights, and moneys attached.

2d. The claim made by Gomila & Co. against Kehlor Brothers, garnishees, in the suit of Gomila & Co. *vs.* Jno. T. Milliken, No. 7967 of the civil district court of the parish of Orleans; the claim made is for $6,200.00, interest, and costs; also the judgment rendered by the civil district court for the parish of Orleans, division C, against Kehlor & Brothers, garnishees, in the suit of Gomila & Co. *vs.* Jno. T. Milliken—Kehlor & Brothers, garnishees—No. 7967 of the docket of said court, for $4,442.00, with interest, at 5% per annum, from June 8, 1883, until paid, and costs, which judgment was rendered on 10 March, 1885, and was signed on 23 March, 1885. Reference is made to the annexed notice of seizure and the returns thereon written, marked C. The services of notices of seizure were
196 made on the parties set forth in the return, as directed by Geo. L. Bright, Esq., pl'ff's attorney. I also made a general and special seizure, by direction of plaintiff's attorney, in the hands of Kehlor Brothers and Duncan M. Kehlor, said by plaintiff's attorney to be a member of the firm of Kehlor Brothers, as will more fully appear by reference to the annexed notice of seizure, marked D, which, together with the return thereon written, forms a part hereof; from all of which seizures nothing has as yet been realized towards the satisfaction of this writ. The real estate seized as above set forth was not advertised for sale by order of plaintiff's attorney. No other property found after due demand made of both parties. This writ expiring, I have made return, and request the clerk of this hon. court to furnish me with a copy thereof, together with all my proceedings thereon, in conformity with law, for the purpose of further proceedings, if required.

Ret'd June 16, 1885.

(Signed) J. R. G. PITKIN,
U. S. Marshal.
E. S. WURZBURGER,
Deputy Marshal.

Letter of Gomila & Co. to A. Wessbriski, president of the Rio Grande R. R. Co., dated 9th June, 1881, now marked Exhibit E, offered by complainant, copied at page 163 of this transcript.

Protests of drafts, marked Exhibits T. & G., H. N. & I.,
197 offered by complainant, copied at pages 165, 167, 170, 172 of this transcript.

Testimony of Larned Torrey, taken Jan. 16, 1885, offered by complainant, copied at page 140 of this transcript.

Testimony of Larned Torrey, taken Jan. 23, 1886, offered by complainant, copied at page 143 of this transcript.

Petition of Mrs. B. H. Bullitt against P. S. Wiltz, Jr., No. 11210 of the docket of this court, offered by complainant.

Petition. Filed January 18, 1886.

To the honorable the judges of the circuit court of the United States for the fifth judicial circuit and eastern district of Louisiana:

The petition of Mrs. Virginia H. Bullitt, widow, and a citizen of the State of Indiana, residing therein, with respect represents that she is the holder and owner of a certain promissory note, made by A. J. Gomila, for the sum of five thousand dollars, dated the 8th day of February, 1884, bearing 8 per cent. interest from the date
198 thereof until paid, and payable, one year after its date, to the order of the said A. J. Gomila, and by him endorsed.

That in order to secure the payment of said note and others, in the aggregate sum of $13,000, at maturity, in principal and interest, the said A. J. Gomila executed a mortgage in favor of A. J. Gomila & Co. on the 8th day of February, 1884 (they being then holders of said note and others), in and by which he specially mortgaged and hypothecated, by act before Samuel Flower, notary public for the parish of Orleans, the following-described real estate, situate in the 6th district of the city of New Orleans, viz:

A certain portion of ground in the square bounded by Nyades or St. Charles, Edmond or Calhoun, and St. Patrick streets and Henry Clay avenue, designated by the letter A on a sketch by A. J. D'Hemecourt, deputy city surveyor, on the ninth day of July, 1872, annexed for reference to an act of sale by L. A. Burthe to Mrs. Robert O. Burthe, passed in this city (of New Orleans) on the 26th day of October, 1872, according to which sketch said portion of ground measures in American measure one hundred and sixty-nine feet front on St. Charles or Nyades street, one hundred and fifty-six feet three inches front on St. Patrick street, three hundred and sixty-six feet five inches and four lines in depth and front on Henry Clay avenue, and three hundred and twenty-five feet nine inches and one line in depth on the line which divides it from the portion of ground designated by the letter "B" on said sketch, and said portion "A" forms the corner of St. Charles street and Henry Clay avenue, and said above-described portions, "A" & "B," form the whole of that certain square of
199 ground which is designated by the number ninety (90) on a plan drawn by Nemigger, surveyor, on the 24th of January, 1854, deposited for reference in the office of Achile Chiapella, late notary public, in this the city of New Orleans, and the said portion marked "A," herein mortgaged, forms the half towards Henry Clay avenue of the above square No. 90, together with all the buildings and improvements thereon, rights, ways, advantages thereunto belonging, being the same property acquired by the said A. J. Gomila by purchase from the Hibernia Insurance Company of New Orleans, as per act passed before W. J. Castell, notary public, of said city, on the 7th day of February, 1884.

And your petitioner avers that said A. J. Gomila bound himself not to alienate or incumber said property to the prejudice of said mortgage, and confessed judgment in favor of said mortgagees for the amount of said notes, aggregating $18,000, as well as in favor of any future holder or holders thereof, in capital and interest, together with all premiums of insurance, and in the sum of five per cent. attorneys' fees upon the amount of the mortgage, in case said notes were not paid at maturity and the holder or holders were compelled to bring suit to enforce said mortgage; all of which will more fully appear by reference to the duly certified copy of said act of mortgage, filed herewith and marked "Exhibit A" for greater certainty, which petitioner prays may be taken as a part of this petition.

Your petitioner further alleges that she is the owner of the said note for $5,000, due one year after the date thereof, as well
200 as the other note for $3,000, concurrently secured in said act, not yet due, for value, having acquired the same in due course of business, but that the other two notes, for $5,000 each, are held by some third person.

Petitioner files herewith the said note for $5,000, now past due and unpaid, and files the same with this petition as a part thereof, marked "Exhibit A^2."

Petitioner further avers that the said A. J. Gomila has recently departed this life, and that his succession has been duly opened in the civil district court for the parish of Orleans, and that P. S. Wiltz, Jr., who is a citizen of the State of Louisiana, residing in the city of New Orleans, has been appointed by said court as dative testamentary executor of the last will and testament of said A. J. Gomila, deceased, which has been admitted to probate in due form of law, and that as such executor he is the legal representative of his succession, having qualified as required by law; that said executor neglects to pay said note for want of funds for that purpose.

Wherefore petitioner prays that executory process may issue herein upon said mortgage, and that after due proceedings the marshal may be directed to seize and sell said property for cash to the amount due upon said note held by petitioner and attorneys' fees, and upon terms of credit corresponding with the note not yet matured, and that your petitioner may be paid the amount due her on said note, with five per cent. attorneys' fees upon the sum secured by said mortgage, and all the costs of this suit, by preference
201 and priority, according to the terms of the said act of mortgage; and she prays for all general relief in the premises.

(Signed) ROUSE & GRANT, *Attorneys.*

Order.

Let executory process issue as prayed for.

(Signed) DON A. PARDEE, *Judge.*

New Orleans, January 18, 1886.

Transcript from Circuit Court, City of St. Louis, Suit Breedlove Smith vs. Gomila & Torrey, Marked Exhibit Z. Testimony Filed February 20, 1886.

United States Circuit Court, Fifth Judicial Circuit, Eastern District of La.

RIO GRANDE RAILROAD CO. *vs.* GOMILA & CO. } No. —.

202 Testimony taken in the office of the clerk of the circuit court of the United States, at New Orleans, La., before the Honl. E. R. Hunt, examiner, Saturday, February 13th, 1886, on behalf of plaintiff.

Appearances: George L. Bright, Esq., for pl'ff; J. O. Nixon, Jr., Esq., for Barker; Wm. Grant, Esq., for Gurley.

By Mr. BRIGHT: On behalf of plaintiff I offer and introduce in evidence transcript from the circuit court of the city of St. Louis, in the suit of Breedlove Smith *vs.* Gomilla and Torrey, duly certified to according to law, marked Plaintiff's Exhibit "Z."

By Mr. NIXON: Counsel for Mr. Barker objects to the introduction in evidence of the above record on the ground that it is a matter between other parties; that Mr. Barker was not a party to that suit, and that the record is irrelevant as to the issues in this case.

By Mr. GURLEY: I make the same objection on my own behalf.

203 PLAINTIFF'S EXHIBIT "Z."

STATE OF MISSOURI, *City of St. Louis,* } *ss:*

Be it remembered that heretofore, to wit, on the 10th day of March, 1885, there was filed in the office of the clerk of the circuit court, city of St. Louis, a petition, affidavit, and exhibit, which are respectively in the words and figures following, to wit:

Petition (Affidavit and Exhibit).

In the Circuit Court, City of St. Louis. April Term, 1885.

STATE OF MISSOURI, *City of St. Louis,* } *ss:*

BREEDLOVE SMITH, Plaintiff, *vs.* A. J. GOMILA and LARNED TORREY, Defendants. }

The said plaintiff, for a cause of action against said defendants states that said defendants, as partners under the name of A. J. Go,

milla and Co., are indebted to him on account for the sum of $13,200.00 for monies paid out by plaintiff for defendants and monies had and received.

BOYLE, ADAMS AND McKEIGHAN,
Pl'ff's Att'ys.

Affidavit.

204 STATE OF MISSOURI, } *ss:*
City of St. Louis, }

Attachment in Civil Action in the Circuit Court of said County.

BREEDLOVE SMITH, Plaintiff,
against
A. J. GOMILA and LARNED TORREY, Defendants.

This affiant states that the plaintiff in the above-entitled cause has a just demand against the defendants therein, now due, and that the amount which this affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, is thirteen thousand two hundred dollars — cents, and that this affiant has good reason to believe and does believe that the defendants and each of them are non-residents of the State of Missouri and residents of the State of Louisiana.

S. R. FRANCIS (*Affiant*).

Subscribed and sworn to before me this 10th day of March, A. D. 1885.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

EXHIBIT.

ST. LOUIS, *March 10th*, 1885.

Mess. Gomila & Co. in Ac. with Breedlove Smith.

205 DR. CR.

1884.			1884.		
Oct. 11	To balance	8,606 93	Nov. 15	By cash	311 72
Nov. 14	" interest	800	Dec. 9	" redemption #1	1,857 06
" 18	" cash	191 67	" 9	" balance	13,634 02
" 18	" "	120 05			
Oct. 30	" bills payable	5,500			
Dec. 9	" redemption #2	584 15			
		$15,802 80			$15,802 80
Dec. 9	To balance	$13,634 02			

E. & O. ex.

And on the same day, to wit, March 10th, 1885, the following bond for attachment was filed in said cause, to wit:

Bond for Attachment.

Know all men by these presents that we, David R. Francis, as principal, and Sidney R. Francis and Henry M. Noel, as securities, are indebted to the State of Missouri in the sum of twenty-six thousand four hundred ($26,400) dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at St. Louis this 10th day of March, eighteen hundred and eighty-five.

The condition of this obligation is such that whereas Breedlove Smith is about to institute a suit in the circuit court, city of
206 St. Louis, by attachment against A. J. Gomilla and Larned Torrey, defendants, for the sum of thirteen thousand two hundred dollars and — cents:

Now, if the said plaintiff shall prosecute his action without delay and with effect, refund all sums of money that may be adjudged to be refunded to the defendant or found to have been received by the plaintiff and not justly due to him, and pay all damages and costs that may accrue to any defendant or any garnishee by reason of the attachment or any process or proceeding in the suit or by reason of any judgment or process thereon, then this obligation to be void; otherwise to remain in full force.

DAVID R. FRANCIS. [SEAL.]
HENRY M. NOEL. [SEAL.]
S. R. FRANCIS. [SEAL.]

Approved this 10th day of March, 1885.

CHAS. F. VOGEL,
Clerk Circuit Court.

And on the same day, to wit, March 10th, 1885, a writ of attachment issued in said cause, which, together with the sheriff's return thereon, is in the words and figures following, to wit:

Writ of Attachment.

THE STATE OF MISSOURI, } ss:
City of St. Louis, }

To the sheriff of the city of St. Louis, Greeting:

We command you to attach A. J. Gomila and Larned Torrey by all and singular their lands, tenements, goods, chattels,
207 rights, moneys, credits, evidences of debt, and effects, or so much thereof as shall be sufficient to satisfy the plaintiff's claim as sworn to, to wit, the sum of thirteen thousand two hundred dollars and — cents, with interest and costs of suit, in whose hands or possession soever the same be found in your bailiwick, and that you summon the said A. J. Gomila and Larned Torrey to appear at the next term of the circuit court, before the judges thereof, on the first day of said

term, to be holden at the city of St. Louis on the first Monday of April next, then and there to answer the action of the plaintiff, Breedlove Smith, as set forth in the annexed petition, and also that you summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects, or money of the defendant may be or who may be named by the plaintiff or —— ——, attorney, as garnishees, and particularly —— ——, that they be and appear before the judges of our said court on the first day of the term aforesaid, then and there to answer unto what may be objected against them; and have you then and there this writ.

Witness Chas. F. Vogel, clerk of our said court, with the seal thereof hereunto affixed, at office, in the city of St. Louis, [SEAL.] this tenth day of March, in the year of our Lord eighteen hundred and eighty-five.

CHAS. F. VOGEL, *Clerk.*

Return on Writ of Attachment.

208 No goods, chattels, or real estate found in the city of St. Louis belonging to the defendant whereas [whereupon] to levy this writ and make the debt and costs or any part thereof; thereupon, by order of plaintiff's attorney, I executed this writ in said city of St. Louis, at the hour of eight o'clock and fifty-five minutes a. m., on the eleventh day of March, 1885, by declaring in writing to J. B. M. Kehlor that I attached in his hands all debts due from him to the defendant and all goods, moneys, effects, rights, credits, chattels, choses in action, and evidences of debt of the defendants, A. J. Gomila and Larned Torrey, or as much thereof as would be sufficient to satisfy the debt, interest, and costs in this suit; and I at the same time, by said direction, further executed said writ by summoning J. B. M. Kehlor as garnishee by declaring to him in writing that I summoned him to appear at the return term of said writ, to wit, on the first Monday of April next, to answer such interrogatories as might be exhibited to him by said plaintiff, and at the same time delivering to him a notice in writing of such garnishment.

HENRY F. HARRINGTON, *Sheriff,*
By JOHN A. MEAD, *Deputy.*

St. Louis, Mo., March 11th, 1885.
Fee, $1.00.

And afterwards, on the 13th day of April, 1885, the following entry of appearance was filed in said cause, to wit:

Entry of Appearance.

STATE OF MISSOURI, *City of St. Louis,* } ss:

In the Circuit Court. April Term, 1885.

BREEDLOVE SMITH, Plaintiff,
vs.
A. J. GOMILA and LARNED TORREY, Defendants.

209 The said defendants hereby enter their appearance in the above-entitled action in said court, and said defendants consent that said case may be submitted to the said court for trial at any time without a jury.

A. J. GOMILA.
LARNED TORREY.

STATE OF LOUISIANA, *City of New Orleans,* } ss:

Personally appeared before me, on this 8th day of April, 1885, the above-named A. J. Gomila and Larned Torrey, to me personally known to be the same persons who executed the foregoing appearance, and acknowledged the execution of the same to be their voluntary act and deed for the purposes therein stated.

In testimony whereof I have hereunto set my hand and official seal the day and year hereinbefore written, at my office, in said city.

My term of office expires in March, A. D. 1888.

[SEAL.] ANDREW HERO, *Not. Pub.*

And afterwards, at a special term of the circuit court, city of St. Louis, and being the April term, 1885, thereof, the following proceedings were had in said cause, to wit:

Judgment.

210 MONDAY, *April 13th*, 1885.

BREEDLOVE SMITH
vs.
A. J. GOMILA and LARNED TORREY. (67095.) Judgment.

Comes now the plaintiff, by attorney, and defendants come also and file their entry of appearance herein and consent that this cause may be submitted to the court for trial at any time without a jury. Thereupon plaintiff withdraws from the claim and account sued on the item of bills payable of $5,500.00, dated Octo. 30*st*, 1884, on debit side of the account sued on, the same furnishing a distinct cause of action not properly included in said account. Thereupon this cause is submitted to the court on the residue of said account and on the evidence and proofs adduced; and the court, having heard the

same and being fully advised of and concerning the premises, doth find for plaintiff and doth assess his damages at the sum of seven thousand seven hundred dollars; wherefore it is considered by the court that plaintiff recover of the defendants the damages aforesaid, assessed as aforesaid, and his costs and charges herein expended, and have therefor execution.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, the same being a court of record in and for said city and
211 State, certify the annexed to be a true copy of the petition, affidavit and exhibit, bond for attachment, writ of attachment and return thereon, entry of appearance, and judgment in a cause wherein Breedlove Smith is plaintiff and A. J. Gomila and Larned Torrey are defendants, being cause No. 67095 of the files of this court, as fully as the same remain on file and of record in my office.

In testimony whereof I hereto set my hand and affix the
[SEAL.] seal of said court, at office, in the city of St. Louis, this third day of February, eighteen hundred and eighty-six.

(Signed) CHAS. F. VOGEL, *Clerk.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Shepard Barclay, presiding judge of the circuit court of the eighth judicial circuit of the State of Missouri, which circuit is composed of the city aforesaid, certify that Charles F. Vogel, whose signature appears to the foregoing certificate, is and was at the time of signing the same clerk of the circuit court, city of St. Louis (the same being a court of record in and for said city and State), and that the said attestation is in due form.

Given under my hand this 3d day of February, 1886.

(Signed) SHEPARD BARCLAY,
Presiding Judge of the Circuit Court of the Eighth Judicial Circuit of the State of Missouri.

212 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis (the same being a court of record in and for said city and State), certify that Shepard Barclay is presiding judge of the circuit court of the eighth judicial circuit of the State of Missouri, duly commissioned and qualified.

In testimony whereof I hereto set my hand and affix the
[SEAL.] seal of said court, at office, in the city of St. Louis, this third day of February, eighteen hundred and eighty-six.

(Signed) CHAS. F. VOGEL, *Clerk.*

The Check Book C. D. Barker, Marked L.

Offered by pl'ff Feb'y 27, 1886.
(Signed) E. R. HUNT, *Examiner.*

212*a*

115	30	72
115	25	6
	50	—
$1,265	50	78
	—	1
		—
		79
10	690	25
20	390	20
—	—	—
	300	45
16650		
70	50	
23650	Due 17th.	
17		400
20		350
20		—
		750
61		175
4		—
—		575
244		40
		—
		611
	300	
	300	
166.50	—	
20.00	600	
50	175	
—	—	
236.50	$425	
1,008.98	15.00	1,222.30
200	250.00	525
—	167.30	—
1,208.98	—	1,747.30
278.83	432.30	
—	50	
1,487.81	—	
1,000.00	482.30	
—	50	
2,487.81	—	
215	532.30	
—	25	
1,702.81	—	
	557.30	
	65.00	
	—	
437.75	622.30	
250	200	
—	—	
187.75	822.30	
283.66	300	
—	—	
471.31	1,122.30	
50	300	
—	—	
$521	1,422.30	
	200	
	—	
	1,222.30	

No. —. *Oct.* 8, 1883.
C. D. Barker 15 00

No. —. *Oct.* 8, 1883.
Kohlman & Co., margins on 10 corn in St. Louis & 8 corn, N. Y. 250 00

No. —. *Oct.* 10, 1883.
Mess. Kohlman & Co., loss on wheat, Vandorff ½ int. on the am't 167 30

	No. —. *Oct.* 26, 1883. C. D. B. 10 00 Loan 40 00 Lezudica. 50 00
	No. —. *Nov.* 3*d*, 1883. C. D. Barker 50 00
	No. —. *Nov.* 8, 1883. C. D. B. 25 00
	No. —. *Nov.* 10, 1883. C. D. B. 65 00 *50 00
	No. —. *Nov.* 23, 1883. Kohlman & Co., margin on lard 200 00
	No. —. *Nov.* 27, 1883. Kohlman & Co. 300 00
	No. —. *Dec.* 8, 1883. Kohlman & Co. 300 00
	No. —. *Dec.* 11*th*, 1883. C. D. Barker 25 00
	No. —. *Dec.* 17, 1883. C. D. B. 25 00
Jan'y 9th. Bal. $340 51 300 00 640 51 D'ft Ja'y 12 300 00 340 51	No. —. *Dec.* 28*th*, 1883. * Le Duc & Thayer 300 00 Paid the cash. No. —. *Jan'y* 2, 1884. Le Duc & Thayer 200 00 No. —. *Jan'y* 9, 1884. Le Duc & Thayer, margins, wheat 300 00
340 51 25 315 51 300 15 51	No. —. *Jan'y* 9, 1884. C. D. B. 25 00 No. —. *Jan'y* 12, 1884. Le Duc & Thayer 300 00 *No. —. *Jan'y* 22*d*, 1884. *C. D. B. 15 00

* Erased in copy.

Bal.		51	
D'ft M'ch 1st		268 75	
		269 26	
		100	
		169 26	
		125	
		44 26	
M'h 3d		40	
		84 26	
			No. —. *Jan'y* 22, 1884.
			C. D. B. 1,500 00
			No. —. *M'ch* 1, 1884.
			Gomila & Co. 100 00
			No. —. *M'ch* 1, 1884.
			Hughes & Glover 125 00
		84 26	
		50	
		34 26	
		25	
		9 26	
Out		9 26	
Book balanced O K. M'ch 8th, '84.			
			No. —. *M'ch* 5, 1884.
			Vandorp loan returned 50 00
			O K.
			No. —. *M'ch* 8, 1884.
			C. D. B., races 25 00
			O K.
Balance forward		915 55	
Bal. forw'd		915 55	
Ap'l 2, dep.		100	
		1,015 55	
		250 00	
		765 55	
			No. 1. *M'ch* 21, 1885.
			Margin, 5, May corn 50
			C. D. Barker 50
			100 100 00
			No. 2. *Ap'l 1st*, 1885.
			C. D. B. 100 00
			No. 3. *Ap'l* 6, 1885.
			C. D. B. 50 00
		765 55	
		175 00	
		590 55	
			No. 4. *April 8th*, 1885.
			John Kent, loan till May 1st, '85 75 00
			N. G.
			No. 5. *Ap'l* 10, 1885.
			C. D. Barker 50 00
			Races; blown in.
			No. 6. *Ap'l 11th*, 1885.
			C. D. Barker 50 00
		590 55	
		335 00	
		255 55	
			No. 7. *Ap'l 13th*, 1885.
			C. D. Barker 40 00
			No. 8. *Ap'l* 15, 1885.
			Jay Gould loan 200 00
			C. D. Barker 25 00
			225 00
			No. 9. *Ap'l* 16, 1885.
			Loan 20
			Van. loan returned 50
			70 00

Am't forw'd	255 55	No. 10.	*Ap'l* 17, 1885.
Ap'l 23d, dep.	180 00	C. D. B.	50 90
	435 55	Loaned A. J. Gomila; returned.	
	120 90	No. 11.	*Ap'l* 24, 1885.
	314 65	C. D. Barker	20 00
		No. 12.	*Ap'l* 25, 1885.
		Sweetheart	40 00
		C. D. B.	10
			50 00
	314 65	No. 13.	*Ap'l* 28, 1885.
Dep. May 2d, cash	550 00	C. J. S. loan	50
	864 65	D. G. G. loan	50
Dep. J. T. G.'s check	1,000 00		100 00
	1,864 65	No. 14.	*May* 4, 1885.
	1,605 00	One share produce exchange stock	105 00
	259 65		100
		Brokerage	5
			105
		No. 15.	*May* 4, 1885.
		A. Luria	1,400 00
	259 65	No. 16.	*May* 7, 1885.
May 12th, dep.	358 49	C. D. Barker	50 00
	618 14	No. 17.	*May* 9, 1885.
	325	J. E. loan	100
	293 14	C. D. B.	25
			125 00
		No. 18.	*May* 12, 1885.
		Exchange on N. Y., order David Barker, interest—2 years—in full to May 15, 1885	150 00
	293 14	No. 19.	*May* 12, 1885.
	115 00	C. D. Barker	50 00
	178 14	No. 20.	*May* 14, 1885.
		C. D. B., Louisville derby races.	40 00
		Won nothing.	
		No. 21.	*May* 18, 1885.
		C. D. B.	25 00

	178 14	No. 21.	*May* 20, 1885.
Dep. May 20	324 05	C. D. Barker	25 00
	502 19		
	114 44	No. 22.	*May* 25, 1885.
	387 75	C. D. Barker—	
		Ins. furniture	17 00
		Mdz.	20 00
		Blown in races	20 00
		C. D. B.	18 00
			75 00
		No. 23.	*May* 28, 1885.
		H. & B. Beer, difference on car corn, 4c. per bus.	16 44
	387 75	No. 24.	*May* 28, 1885.
Dep. May 29, Gibbon's ch'k	500 00	L. Torrey, margin on pork with Kohlman	200 00
	887 75	Torrey & Barker.	
	450 00	No. —.	*May* 29, 1885.
	437 75	Le Duc & Thayer, margin Chicago corn, 5 m's, Sept.	200 00
		No. 26.	*May* 30, 1885.
		Mrs. C. D. B.	50 00
	437 75	No. 27.	*June* 4, 1885.
	100	C. D. Barker	100 00
	337 75	No. 28.	*June* 5, 1885.
	150 00	Mrs. H. A. Bancroft	150 00
	187 75	*Duplicated	150 00
Dep't June 5th, '85	283 66	No. 29.	*June* 5, 1885.
	471 41	C. D. Barker	450 00
	450 00		
	21 41		
	2 00		
Error #23	19 41		
Aug. 17th	187 60		
	207 01		
	*19 41	No. 30.	*June* 5, 1885.
	207 01	Mrs. H. A. Bancroft, to replace #28, lost to-day	*150 00
	150	This cancelled; #28 found all O K.	
	57 01	No. 31.	*Aug.* 19, 1885.
		*Kohlman.	
		Margin	100 00
		Lost.	
		No. 32.	*Aug.* 20, 1885.
		C. D. Barker	50 00

* Erased in copy.

Am't forward	57 01		
	250 00		
	307 01	No. 32.	*Aug.* 28, 1885.
	70 00	C. D. Barker	50 00
	377 01	No. 33.	*Sept.* 2*d*, 1883.
	150	S. J. Kohlman, favorite hog	150 00
	227 01	No. 34.	*Sept.* 5, 1885.
	50	C. D. Barker	50 00
	177 01		
	50		
	127 01		
	127 01	No. 35.	*Sept.* 28, 1885.
Sept. 28th, dep.	397 75	H. H. Smith, borrowed money returned	50 00
	524 76	No. 36.	*Sept. 28th*, 1885.
	350 00	C. D. Barker	100 00
	174 76	No. 37.	*Sept.* 30, 1885.
		Le Duc & Thayer	200 00
	174 76	No. 38.	*Oct.* 2, 1885.
Disc't Aug. 5, 200.06	197 24	C. D. Barker	20 00
	372 00	No. 39.	*Oct.* 5, 1885.
	236 50	S. J. Kohlman, bal. loss on pork, joint % with —— ——	166 50
	135 50	No. 40.	*Oct.* 7, 1885.
		C. D. Barker	50 00
		Amount carried forward	*236 50
	135 50	No. 41.	*Oct.* 9, 1885.
	270	Bucket shop, orig. margin 50	
	405 50	Kohlman 12 50, paid	62 50
	62 50		
	343 00	No. 42.	*Oct.* 13, 1885.
	50	Bucket shop, margin, additional	50 00
	293 00	No. 43.	*Oct.* 24, 1885.
	120 88	Lost, old sore, Le Duc & Thayer	120 88
	172 12		
	172 12	No. 44.	*Oct.* 24, 1885.
	125 00	C. D. Barker	25 00
	47 12	No. 45.	*Oct.* 27, 1885.
		McC. & Co., loss	75 00
		No. 46.	*Oct.* 30, 1885.
		C. D. Barker	25 00

*Erased in copy.

	47 12	No. 47.	*Nov.* 4, 1885.
Dep'd Nov. 9th	600	C. D. Barker, groceries, &c.	45 00
	647 12	No. 48.	*Nov.* 9, 1885.
	45	Gray gelding	155 00
	602 12	No. 49.	*Nov.* 11, 1885.
	155	E. C. Fenner	165 00
	447 12		
	165		
	282 12		
	282 12	No. 50.	*Nov.* 11, 1885.
	50	C. D. Barker	50 00
	232 12	No. 51.	*Nov.* 14, 1885.
	200	Ruth, on %, by express	200 00
	32 12	No. 52.	*Nov.* 14, 1885.
Nov. 19th, 1885, dep. bills payable on demand.		A. Luria, C. D. Barker, order, eleven shares La. Nat'l Bank stock at 115, % M. B.	1,265 00
	6,985 00		
	7,017 12		
	1,265 00		
	5,752 12		
Am't forward	5,752 12	No. 53.	*Nov.* 19, 1885.
	5,750 00	La. Nat'l Bank, 50 S. S. @ 115	5,750 00
	2 12	No. 54.	*Nov.* 23, 1885.
Nov. 20th, dep.	180 00	G. & O. loan	2,000 00
	182 12	Ret'd Dec. 3d, '85.	
Dep. Nov. 23d	37 25	No. 55.	*Dec.* 4, 1885.
	219 37	J. R. Knapp, in full	95 00
	2,004 44		
	2,223 81		
Dep. Dec. 3	2,000 00		
	223 81		
	95		
	128 81		

	128 81	No. 56.	*Dec.* 8, 1885.
Dec. 12, dep.	268 08	W. A. Arnold	125 00
	396 89		125
	125	Cash	25
	271 89		150
	175 00	Loan, 60 days.	
	96 89	No. 57.	*Dec.* 12, 1885.
	50	L. Torrey	50 00. paid
	46 89	Kohlman	60 00
		Dis. bill	30 00
		McCown	25 00*
		*C. D. B.	20 00
			175 00
		Van.	20 00
		C. D. B.	15 00
		No. 58.	*Dec.* 14, 1885.
		C. D. B.	50 00

Am't forward	46 89	No. 59.	*Dec.* 19, 1885.
Dep. Jan'y 4th, '86, check div'd	244 00	Ruth McKean, Inter Lachen, Florida, exchange on N. Y.	600 00
	290 89		
Dep.	493 11	No. 60.	*Dec.* 22*d*, 1885.
	784 00	C. D. Barker	40 00
	600	No. 61.	*Dec.* 23, 1885.
	184 00	Loaned Kohlman	50 00
	90		
	94 00		

	94 00	No. 62.	*Jan'y* 15, 1886.
	2,921 38	C. D. Barker, bearer	40 00
	3,015 38	No. 63.	*Jan'y* 21, 1886.
	40 00	Sheridan & Regan, s't d'ft, State Nat'l Bank	1,500 00
	2,975 38		
	1,500 00	No. 64.	*Jan'y* 21, 1886.
	1,475 38	C. D. Barker	40 00
	40 00		
	1,435 38		

*Erased in copy.

	1,435 38	No. 65.	*Jan'y* 22, 1886.
Dep. prs. Jan'y 22d	588 00	La. Nat'l Bank, % note	2,000 00
	2,023 38	No. 66.	*Jan'y* 22, 1886.
	2,000 00	Sam'l H. Kohlman, loan %	20 00
	0,023 38	No. 67.	*Jan'y* 30, 1886.
	20 00	C. D. Barker	100 00
	3 38		
Dep. F'd'y, 10, '86, % McCloskey	500 00		
	503 38		
	100		
	403 38		
	403 38	No. 68.	*Feb'y* 6, 1886.
	50	C. D. Barker	50 00
	353 38	No. 69.	*Feb'y* 10, 1886.
	50 00	C. D. Barker	50 00
	303 38		

213 *Document X Y Z. Offered by Complainant Feb'y* 27, 1886.

C. D. Barker in account current with the Louisiana National Bank of New Orleans.

Dr.				Cr.			
1885.				1884.			
Oct. 17	To cash	10,000		Oct. 1	By balance	9	26
29	" "	6,251	40	15	" cash	75,000	
Nov. 1	" balance	58,757	86				
		75,009	26			75,009	26
1884.				1884.			
Nov. 5	To cash	2,000		Nov. 1	By balance	58,757	86
10		1,000		1885.			
13		1,000		Feb'y 6	" cash	3,777	50
1885.				9	" "	300	
Jan'y 5		3,000		11	" "	2,348	94
Feb'y 26		17,268	75	Apr. 2		100	
M'ch' 2		30,000		23		180	
11		10,000		May 2		550	
21		100		4		1,000	
Apr. 1		100		12		358	49
6		50		20		324	05
8		75		29		500	
10		50		June 5		283	66
11		50		Aug. 17		187	60
13		40		31		250	
15		225		Sept. 2		70	
16		70		28		397	75
17		50	90	Oct. 5	Discount	197	24
24		20		21		270	
25		50		Nov. 9		600	
28		100		19	Demand loan	6,982	
May 4		1,505		20		180	
8		50		23	Exchange	37	25
9		125		Dec. 3		2,004	44

Document X Y Z—Continued.

1885.				1885.			
May	12	To cash	200	Dec.	12	By exchange	268 07
	14		40	1886.			
	19		25	Jan'y	4		244
	20		25		6	Discount	493 11
	25		75		20		2,921 38
	28		200		21		588
	29		216 44	Feb.	10		500
	30		50				
June	4		100				
	5		450				
	8		150				
Aug.	19		100				
	21		50				
	28		50				
Sept.	2		150				
	5		50				
	28		150				
	30		200				
Oct.	2		20				
	6		166 50				
	7		50				
	10		62 50				
	14		50				
	24		145 88				
	27		75				
	31		25				
Nov.	5		45				
	10		155				
	11		50				
	12		165				
	14		1,465				
	19		5,750				
	23		2,000				
	30		3 87				
		To amount carried f'd	79,439 84			By amount carried f'd	84,671 34
		To amount bro't fo'w'd	79,439 84			By amount bro't fo'w'd	84,671 34
Dec.	4	To cash	95	1886.			
	8		125	Feb'y	24	" balance	222 16
	12		175				
	14		50				
	19		600				
	22		40				
	23		50				
	31		2 16				
1886.							
Jan'y	15		40				
	21		1,540				
	22		2,020				
	30		100				
Feb'y	6		50				
	10		50				
	15		291 50				
	17		75				
	19		150				
			84,893 50				84,893 50
1886.							
Feb'y	24		222 16				

214 The 3rd opposition of J. Ward Gurley, Jr., filed in the suit of The Rio Grande R. R. Co. *vs.* Gomila and Co., No. 10628 of the docket of this court, offered by complainant.

Petition and 3rd Opposition of J. Ward Gurley, Jr. Filed Nov. 4, 1885.

RIO GRANDE R. R. Co. *vs.* GOMILA & Co. } No. 10628.

To the hon. the judges of the circuit court of the United States for the 5th circuit and eastern district of Louisiana:

The petition and third opposition of J. Ward Gurley, Jr., with respect represents that the plaintiff in the case of Rio Grande Railroad Company *vs.* Gomila & Co., No. 10628 of the docket of this hon. court, under a judgment by it obtained therein against the said defendants, has issued writs of *fieri facias* and caused the marshal of this district to seize and advertise for sale as the property of the said defendants the following-described claims and judgments, viz: The claim made by Gomila & Co. against Culliford and Clarke, in suit No. 10965 of the docket of the dist. court of the U. S. for the eastern dist. of La., and the judgments rendered in said suit against Culliford & Clarke and others, both in said district court and in this circuit court; also the judgments rendered in the civil dist.
215 court for the parish of Orleans, div. C., in favor of Gomila & Co. and against John T. Milliken and against Kehlor Bros., garnishees, said suit being No. 7967 of the docket of said court; all which, together with other particulars, will more fully appear from the said advertisement, a copy of which is hereto attached and made part of this petition.

Your petitioner and third opponent avers that he has a lien and privilege on the judgments so seized and advertised for sale as aforesaid, and on the proceeds thereof should said sale be made, which ranks and is superior to that of said seizing creditor, for this: That your petitioner, as attorney and counsellor at law for and on behalf of said Gomila & Co., instituted and prosecuted the said causes against the respondents, defendants and garnishees therein, and obtained the judgments which are now under seizure and advertised as aforesaid; that for his professional services in said causes the said Gomila and Co. stipulated to pay your petitioner a sum equal to fifty per centum of the amount of such judgments as might be obtained.

Further, petitioner shows that under the laws of Louisiana he is entitled for the payment of his said services to a privilage on the said judgment so by him obtained, and that his said services are justly and reasonably worth the sum of eighty-two hundred and nineteen and $\frac{50}{100}$ dollars.

This sum represents the amount due him in the case of Gomila & Co. *vs.* Milliken and Kehlor Bros., garnishees, and $\frac{1}{2}$ of the fee in the Culliford and Clarke case, the other half of which goes to Mess. Rouse and Grant.

216 Wherefore petitioner prays that the said Rio Grande Railroad Company, through its attorney, Geo. L. Bright, Esq., be cited, and that R. B. Pleasants, marshal of this district, be notified of this petition, and that the said marshal be directed to require from the purchaser or purchasers of said claims and judgments the payment in cash of the full amount of the adjudication price, and to retain the same subject to the further orders of the court herein.

And, further, petitioner prays that after due proceedings had he be adjudged to have a first lien and privilege on the proceeds of the sale of said judgment to the amount of eight thousand two hundred and nineteen and $\frac{52}{100}$ dollars, and that he be paid therefrom the said sum. Petitioner further prays for costs and general relief.

(Signed) J. WARD GURLEY, JR.

Order.

Let the marshal be directed to require the purchaser to pay cash and to hold the proceeds of the sale subject to the further order, as prayed.

Nov. 4, 1885.

(Signed) ALECK BOARMAN, *Judge.*

The bank book of C. D. Barker with the La. State National Bank, marked Exhibit L, offered by complainants (copied at page 212 of this transcript).

217 *The Testimony of Owen Gernon, Offered by Complainants.*

United States Circuit Court for the Eastern District of Louisiana.

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et al.* } No. 11013.

Testimony taken on the 6th day of March, 1886, on the part of plaintiffs in the above entitled and numbered cause, before E. R. Hunt, Esq., special examiner.

Appearances: George L. Bright, Esq., solicitor for pl'ffs; Jonas & Nixon, Esqs., solicitors for Barker; Mess. Rouse & Grant, solicitors for J. Ward Gurley, Jr., Esq.

Agreement.—It is agreed between the parties present that the oath of Mr. George C. Lafaye to the account marked "X" "Y" "Z," produced by him on the 27th day of February, 1886, and on file herein, is waived, and that the same shall have the same effect as a sworn deposition.

Witness.—OWEN GERNON, being duly sworn as a witness for plaintiffs and examined by Mr. BRIGHT:

Q. What is your occupation?

218 A. I am a book-binder.

Q. How long have you been acting as such?

A. As a book-binder?
Q. Yes.
A. For over twenty-five years.
Q. You are now engaged in that business?
A. Yes, sir.
Q. Will you please look at this check book—it is the check book of Mr. Barker on file here, marked "L"—and state whether any part of it has ever been taken out?

(Witness examines the check book referred to.)

A. There is no leaf gone. A leaf could have been taken out or put in by such a person as myself. I could take them out and put them all back again without it being seen.
Q. Well, has any part of it ever been taken out?
A. No, sir; there has not been any taken out recently that I can see.
Q. There has been none taken out, you say?
A. None that I can see. All the leaves in this check book are perfect. They are all whole sheets, and there has been no half sheets taken out, because that could be readily seen. There could be a sheet taken out in the middle of the book and no person could know it, but that I can't tell, whether there was or not. Let me examine the book again. (Witness examines the book.) The first section in the book has twelve leaves and six sheets.
219 Q. And that is all right?
A. That I cannot tell. If you will tell me how many checks there were in the book at first I could tell you in case one was taken out. The next section of the book has five sheets and ten leaves.
Q. Could one sheet have been taken out of that section—could it be done?
A. Certainly it could.
Q. Well, the next section?
A. The next section has got five sheets, too, and ten leaves.
Q. And the next one?
A. That is all. Ninety-six checks is as near a hundred that they generally put in the book.
Q. Could they not have been taken out of that book and your not being able to detect it?
A. Yes, sir; two leaves could have been taken out and I would not be able to detect it.
Q. How could that be done?
A. By taking these two leaves in the middle of a section—those two—and tearing them in that manner.
Q. How many checks were originally in this book?
A. I don't know, sir. That is something that can't be answered.
Q. How many leaves were originally in each section?
A. I don't know, sir.
Q. Do you always put the same number of leaves in each section?
A. Sometimes to make up a book of a hundred checks we

220 generally make it up with so many leaves, and if it is necessary to put one sheet more in a section or less, we do so.

Q. Those check books are generally put up with one hundred checks in a book?

A. All common check books that are furnished by the banks are generally put up with one hundred checks in a book.

Cross-examination by Mr. NIXON:

Q. This check book contains ninety-six checks, does it not? Three on each page?

A. I did not add it up.

Q. There are three on each leaf, and you have ten, ten, and twelve leaves, making thirty-two leaves, and three times thirty-two make ninety-six checks.

—. ——.

Q. If you wanted to add more checks to it how would you do it?

A. I would put another sheet in the section.

Q. Which would make six more checks?

A. Yes, sir; six more.

Q. It would make more than one hundred?

A. Yes, sir.

Q. I understand you to say that from the middle of these sections or signature it would be easy to take a sheet out?

A. Yes, sir.

Q. You put a sheet on each side of the signature?

A. All the same thing—each one.

Q. You can't take out one-half of a sheet without taking out the other without being able to find it out?

221 A. No, sir; you can take out any sheet except the three outside sheets of the signature.

Q. What do you mean; you say the three outside sheets?

A. The three outside sheets that touches the back of the book; they touch the back of the book on the inside, and they are held together by glue on the back of the sheets.

Q. So, then, you mean the three sheets which are on the back of the signature, or three nearest to the binding of the book?

A. Yes; the outside of the book.

Q. Could it not be removed without detecting it?

A. By an expert, of course.

Q. But by a person not an expert?

A. Of course they could not.

Q. Did you ever see this book before you came up here?

A. I don't remember that I have; I may have bound it, but I don't remember it.

Cross-examination con'd by Mr. GRANT:

Q. From the appearance of this book you would not judge that it has been doctored with since it was made?

A. Since it was originally made new?

Q. Yes.

(Witness examines the book.)

A. No, sir; I don't think it has been tampered with.

Mr. Bright, counsel for plaintiff, offers in evidence the petition of third opposition of J. Ward Gurley, Jr., filed in the suit of The Rio Grande Railroad Company *vs.* Gomilla & Co., No. 10628
222 of the docket of the United States circuit court.

Case closed.

Finis.

Proceedings before examiner of Feb'y 27, 1885, wherein C. D. Barker produced the bank book L and wherein Geo. C. Lefaye produced account marked X Y Z.

THE RIO GRANDE R'R'D
vs.
GOMILA & *al.*
} No. 11013.

FEB'Y 27, 1886.

Present: G. L. Bright, counsel for pl'ff; J. O. Nixon, Jr., for C. D. Barker.

Present: Larned Torrey.

Absent: J. W. Gurley, Jr.

C. D. Barker, defendant, produces for the examiner and deposited with the examiner to remain with the trial of this cause check-book stub marked "L." Counsel for pl'ff waived the production of bank books called for. Counsel for pl'ff offers in evidence the check-book stub marked L. Mr. Geo. C. Lafaye produced and deposited with the examiner copy of the ac. of C. D. Barker with the
223 La. Nat. Bank, beginning Octo. 1, 1884, and closing Feb'y 24, 1886, marked X Y Z.

Counsel for the pl'ff offers the above-described account in evidence, marked X Y Z.

On ac. of the absence of Mr. J. W. Gurley and his counsel the further taking of evidence — till Sat. next by consent of parties.

United States Circuit Court, Fifth Judicial Circuit, Eastern Dist. of La.

RIO GRANDE RAILROAD CO.
vs.
GOMILLA & CO.
} No. —.

Testimony taken in the office of the clerk of the circuit court of the United States, at New Orleans, La., before the Honl. E. R. Hunt, examiner, Saturday, February 13, 1886, on behalf of defendant Barker.

Appearances: George L. Bright, Esq., for pl'ff; J. O. Nixon, Esq., for def't; Wm. Grant, Esq., for Gurley.

224 GEORGE C. LAFAYE, Esq., sworn for defendant, says:

By Mr. NIXON:

Q. What is your occupation?

A. Book-keeper of the Louisiana National Bank.
Q. How long have you been such?
A. Sixteen years.
Q. Do you know Mr. Caleb D. Barker?
A. Yes, sir.
Q. Has he kept an account in the Louisiana National Bank?
A. Yes, sir.
Q. Who kept that account?
A. I did.
Q. Have you examined that account recently?
A. Yes, sir; I have.
Q. Do you know anything about three certain checks drawn by Mr. Barker upon that bank, one for two thousand dollars, one for one thousand dollars, and one for one thousand dollars, purporting to be drawn in November, 1884?
A. Yes, sir.
Q. What do the books show about that?
A. The books show that on November 5th Mr. Barker was charged with a check for two thousand dollars, and on November 10th he was charged with a check for one thousand dollars, and on 13th November he was charged with another check of one thousand dollars.

225 Q. Look at these checks and state (witness shown three checks, marked "Defendant Barker Exhibits Nos. One, Two, Three") if that is the stamp of the bank upon them.

A. Yes, sir; those are the three checks. They have been charged upon the respective dates stated.
Q. You recognize the stamp of the bank?
A. Yes, sir.
Q. As having been paid?
A. Yes, sir.
Q. Will you please note check marked "No. one," which appears to be dated November 6th, and state what day that was paid by the bank?
A. On the fifth of November.
Q. Does that appear from the books?
A. Yes, sir; it appears as having — charged on November 5th.
Q. That also appears on the stamp?
A. Yes, sir.

By Mr. NIXON: I offer these three checks in evidence.

No cross-examination.

CALEB D. BARKER, Esq., sworn on his own behalf, says:

By Mr. NIXON:

Q. You are one of the defendants in this case?

226 A. Yes, sir.

Q. Are the two mortgage notes for ($5,000.00) five thousand dollars, which are described in the answer in this case, now in your possession?
A. Yes, sir.

Q. When did you get possession of them.
A. On the fifth day of November, 1884.
Q. Who did you get them from?
A. Larned Torrey.
Q. Under what circumstances?
A. Mr. Torrey told me that he had to pay ($2,000.00) two thousand dollars to the State National Bank on that day, and he asked me if I could loan him two thousand dollars for a few days, and he would give me—that I would be secured—that he would give me this [these] mortgage notes on Mr. Gomilla's home; that it would be a great accommodation to him if I could do so. I told him that I would do so. I went up to the Louisiana National Bank and took a check off from the desk and filled it up to bearer for two thousand dollars and gave him the money.
Q. Did you draw the money then?
A. Yes, sir; I drew the money from the Louisiana Nat'l Bank.
Q. Is that the check?
A. Yes, sir; it seems that I dated it the sixth, because I was in a hurry and I made a mistake in the date (check No. one).
Q. When did you get the notes?
227 A. I walked with him to the corner of Gravier street, or he went into the State National Bank, and I waited for him until he came out of the bank, and he came and handed me the notes. I looked at them and put them in my pocket.
Q. Did you ever have any further dealings or advances regarding these notes?
A. A few days afterwards he asked me for another thousand dollars. I went to the bank and drew a check in the same way and gave him the money, one thousand dollars.
Q. Is that the check, document No. 2?
A. Yes, sir.
Q. What day was that?
A. November 10th.
Q. Did you advance him any other moneys?
A. Yes, sir.
Q. How much more?
A. He asked me a few days later for another thousand dollars, which I gave him.
Q. Where did you get the money from?
A. Drew it in the same way from the bank.
Q. Is that the check?
A. Yes, sir; that is the check (check No. 3). He told me that it was only a matter of a few days, and that he would take them up.
Q. What security did he give you for the return of the four thousand dollars ($4,000.00)?
228 A. He gave me those two notes of five thousand dollars ($5,000.00) each, and he brought me also a copy of the mortgage and a certificate from the mortgage office before he got the other two thousand dollars.
Q. Did he make any other request for money?
A. I told him that I would not pay him any more.

Q. Did he make any further request?

A. Yes, sir; I believe that he did. I won't be positive about that. I know that I told him that I would not pay another cent.

Q. Did you have any other transaction with Mr. Torrey in regard to the ownership of the notes?

A. As time went along I wanted my money, and I became anxious about it, and asked him so many times that I became ashamed of myself, and then I told him that unless he paid me that money within a certain number of days that I would consider those notes as my own as they — endorsed in blank, and that unless he would take them up I would claim the paper as my own.

Q. Did he agree to that?

A. I think after that he asked me for that paper, either to make some—I don't know whether he—I suppose that he wanted to raise the money on it to pay me, and I gave him the paper.

Q. How long did he have it?

A. I don't know; he may have had it over night or over Sunday.

Q. Did he return it to you?

229 A. Yes, sir; exactly as it was.

Q. With that exception has that paper been in your possession since you got it?

A. Yes, sir.

Q. Where?

A. In the bank box in the Louisiana Bank.

Q. In regard to the ownership of the notes, did Mr. Torrey agree to that proposition of yours?

A. Yes, sir.

Q. About when was that?

A. I think it was in December.

Q. Same year?

A. I think it was in December of 1884.

Q. You are sure that the delay was not more than 30 days?

A. I think it was until the end of the year. It may have possibly been in January; I could not say.

Q. You are positive that it was not more than thirty days?

A. It was to the end of that running month. I think it was in December, but it may have been in January.

Q. Have you ever rec'd back from Mr. Torrey or Mr. Gomilla or any other person one dollar of this four thousand dollars ($4,000.00)?

A. No, sir.

No cross-examination by Mr. Gurley.

Cross-examination by Mr. BRIGHT:

230 Q. Mr. Barker, you are requested to produce and exhibit the two mortgage notes that you hold.

A. I will do so.

Q. Mr. Barker, when did you become acquainted with Mr. Gomilla and Mr. Torrey?

A. I give it up—fifteen years ago.

Q. Have you had any business relations with Gomilla & Co.; and, if yea, from what time to what time?

A. I believe that I have bought some grain from them occasionally—from Mr. Gomilla or Gordon and Gomilla—once in a year or twice in a year ever since.

Q. Have you sold grain to them or bought grain for them?

A. I think that I have bought some grain for them, and I have bought grain from them.

Q. Was your office in their office?

A. No, sir.

Q. You have been intimate with them, have you not?

A. Business acquaintances.

Q. Have you ever had any accounts with them?

A. I don't know that I ever had any account with them in my life.

Q. When did the credit of Gomilla & Co. cease to be good?

A. I don't know that it ever ceased.

Q. They were unable to pay you?

A. It seems that they were unable to take up this paper. They did not do so. I don't know whether they were unable to do so or not.

231 Q. When was it that they first failed to meet their pecuniary obligations?

A. To me?

Q. To anybody.

A. I don't know. I heard that the firm——

By Mr. GURLEY: Don't state what you heard.

By Mr. BRIGHT:

Q. Tell us what you heard.

By Mr. GURLEY: I object.

A. I heard that they loaded seven or eight steamers here with grain, and therefore I did not think that they were broke. I know that they loaded them.

Q. Can you tell me the time when their credit ceased to be good?

By Mr. GURLEY: I object to that question and the evidence sought to be adduced thereunder, as it is not the best way of establishing the insolvency of the parties, and, further, because it is not admissible under the pleadings.

A. I cannot.

By Mr. BRIGHT:

Q. Do you know that they had failed to meet their obligations?

A. No, sir. I heard so.

By Mr. GURLEY: I object to hearsay evidence.

232 By Mr. BRIGHT:

Q. When did you hear so?

By Mr. GURLEY: I object on the grounds stated above.

A. I never heard a man say that Gomilla & Co. owed them a dollar that they never paid. I heard that the Rio Grande Railroad Co. had sued them.

Q. Don't you know that they owed to many other persons besides the Rio Grande Railroad Co?

A. I knew nothing about it, sir.

Q. You never heard of the financial difficulties of Gomilla & Co.?

A. I did not until I heard that the Rio Grande Railroad Company had sued them; some time afterwards; I don't know when.

Q. Had they not gone to protest before that suit?

A. Not to my knowledge.

Q. Hey?

A. Not to my knowledge.

Q. Who gave you the two notes for five thousand dollars each?

A. Mr. Torrey.

Q. Where did he get them from?

A. He told me that they were in the State National Bank, and when he came out he handed me the notes.

Q. How did they get in the State National Bank?

233 A. I think that he told me that they were pledged there.

Q. Pledged for what?

A. He did not tell me.

Q. You were at that time intimate with Mr. Torrey?

A. Yes, sir.

Q. He was the brother-in-law of Gomilla?

A. I believe so.

Q. He was the partner of Gomilla?

A. I believe so.

Q. Aren't you sure of it?

A. Well, I saw the advertisement. I never saw the articles of copartnership.

Q. Who was the money man of the firm of Gomilla & Co.?

A. I suppose Mr. Gomilla. I knew nothing about it.

Q. Hey?

A. I suppose Mr. Gomilla. I have no knowledge of my own. I don't know.

Q. Had you knowledge that Mr. Torrey was not a man of means?

A. No, sir.

Q. Had you knowledge that he was a man of means?

A. No, sir. I may state that I never knew him to owe anybody anything that he did not pay.

Q. To whom did those two notes for five thousand dollars each belong to before you got them?

A. I give it up. They came to me from Mr. Torrey.

Q. To whom did those two notes belong to that Mr. Torrey

234 handed to you?

A. I don't know.

Q. Did you read the act of mortgage?

A. Yes, sir; I had a copy of it.

Q. You said that Mr. Torrey told you that you might take those two notes for yourself?

A. Yes, sir.

Q. Hey?

A. Yes, sir.

Q. Did not that strike you as an unusual transaction?

A. No, sir.

Q. When Mr. Torrey gave you those two mortgage notes he gave them to you as collateral security?

A. Only.

Q. Did he give you any other acknowledgment of indebtedness?

A. No, sir.

Q. Did he give you any other evidence of indebtedness to him for what you had advanced him?

A. No, sir.

Q. Did you know at that time that Gomilla & Torrey had been sued by the Rio Grande Railroad Co.?

A. I don't remember.

Q. Did you know at that time that they had failed to meet their obligations?

A. I don't know it yet, to my own knowledge.

Q. When you took those two mortgage notes did you
235 know that there were other mortgage notes out on that same property?

A. My recollection is that I did.

Q. Who held the others?

A. I never knew.

Q. Do you know now?

A. No, sir, except from what I heard in this room here.

Q. How much mortgage was there on that property when you took the two notes?

A. Eighteen thousand dollars.

Q. Did you inquire who held the other notes?

A I don't think that I did.

Q. Did you ascertain the value of the property?

A. I did not. I knew the property.

Q. Did you inquire into the consideration of these notes?

A. No, sir.

Q. Who was indebted to the other, to your knowledge or belief—Torrey or Gomilla?

A. I don't understand you.

Q. Did Torrey owe Gomilla money or Gomilla owe Torrey money?

A. I don't know.

Q. Did you know that Torrey was a partner that had furnished no capital to the firm?

A. I knew that he was a partner, nothing more.

Q. Did you know, either directly or indirectly, from your general knowledge of Mr. Torrey's means that he had no capital in the firm?

236 A. I do not.

Q. Do you know of any property that he owned?
A. No, sir.
Q. Do you know that he owned none?
A. No, sir.
Q. What property does he own?
A. I don't know.
Q. Do you know that Gomilla owned property?
A. I suppose that he owned his home.
Q. Where was Gomilla when you got those two mortgage notes?
A. Out of the city.
Q. Did you consult him about lending the money and taking those two notes?
A. No, sir.
Q. When Mr. Torrey rec'd back those two notes from you for what purpose did you give them to him?
A. He asked me to loan him the notes, and he promised to bring them to me that day or the next day. He gave me his word that he would hand them back to me as they were, and I gave them to him.
Q. What was he to do with them?
A. I suppose that he wanted to see if he could raise the money to pay me. I do not know what he wanted to do with them.
Q. Did you take any receipt from him for them when you gave them to him?
A. I did not.
237 Q. How long did he have them?
A. I can't say; maybe twenty-four hours.
Q. You did not consider Mr. Torrey at that time a man of any responsibility, did you?
A. I considered his word as good as gold.
Q. You do not consider that he owned those mortgage notes, do you, and that that money was due to him individually?
A. No, sir; I did not think about it. I suppose that it was Gomilla & Co.
Q. Did you suppose that they were Gomilla's notes?
A. I supposed that they belonged to Gomilla & Co.
Q. At that time that firm was not in existence, was it?
A. I believe so. I don't know when they dissolved.
Q. You don't know when they dissolved?
A. I believe it was in existence.
Q. It was after the suit of the Rio Grand Railroad Company?
A. I don't know. I suppose so.
Q. Do you know that Gomilla made a transfer of his furniture to Camors?
A. No, sir.
Q. Do you know Breedlove Smith?
A. Yes, sir.
Q. Was he a clerk for Gomilla & Co.?
A. I don't know.
Q. Did you not see him in the office of Gomilla & Co?
A. I never saw him in my life at that time to know him.

238 Q. What did the mortgage act state was the consideration for these mortgage notes?

A. I don't remember.

Q. You did not examine it, did you?

A. Not particularly.

Q. Hey?

A. Not particularly; I don't remember that I did.

Q. You did not examine it before you gave the money, did you?

A. Yes, sir; I examined the mortgage after I gave him the first two thousand dollars.

Q. Before you gave the two thousand dollars?

A. The other two thousand.

Q. Before you gave him the other two thousand dollars?

A. Yes, sir.

Q. When you gave him the first thousand dollars had you examined the act?

A. I did not give him any "first thousand dollars."

Q. The first two thousand?

A. No, sir; after that I did.

Q. Did you know on what you were lending your money when you gave him the two thousand dollars?

A. On his word and on those two mortgage notes.

Q. You do not know by what the mortgage notes were secured?

A. Yes, sir.

Q. How did you know?

A. Because he told me that it was Gomilla's home place.

239 Q. Was Torrey managing the business for Gomila at that time?

A. Yes, sir.

Q. Managing all of his business whilst he was away?

A. Yes, sir; I believe so; all that I know of.

Q. Gomila was away sick?

A. No, sir.

Q. Did you consider that you were lending that money to Gomila?

A. No, sir.

Q. Hey?

A. No, sir.

Q. To whom were you lending it?

A. Lending it to Torrey for Gomila & Co., as I supposed.

Q. Did you know that these notes had once been pledged before?

A. Before what, sir?

Q. Before you got them.

A. I think that he told me that they were pledged in the State National Bank.

Q. Did he tell you that they had also been pledged to the Teutonia Ins'ce Co.?

A. No, sir.

Q. Did you know that they had been there?

A. No, sir.

Q. Have you got the stubs from which those two checks were taken?

A. I have not.

Q. From which any of them were taken?

A. No, sir.

240 Q. Did you keep a check book with the Louisiana National Bank?

A. Sometimes.

Q. Have you got that check book?

A. That these checks came from?

Q. Have you got check book of November 9th, 10th, 13th?

A. I don't remember. I believe I have. I took those checks from the desk in the bank.

Q. Do you or not know whether you got a check book of November 6th, 10th, & 13th?

A. Very likely I have. I don't know.

Q. You don't know?

A. I don't know?

Q. You did not turn it up?

A. No, sir.

Q. Hey?

A. No, sir. I had an account there for a good many years. I sometimes write a check in the book and sometimes I go into the bank and take up a blank check.

Q. If you draw a check outside of your office would you not enter it on your check book when you got back to your office?

A. No, sir; not necessarily.

Q. Well, then, how would you make your check book balance?

A. I never — it to balance in my life.

Q. Mr. Barker, you are requested to produce your check book for November, 1884.

By Mr. NIXON:

241 Q. Mr. Barker, how long have you kept an account with the Louisiana National Bank?

A. Nearly ever since it was a bank—perhaps a year afterwards.

Q. How often did you usually have your book balanced?

A. Once a year, I reckon; sometimes oftener; sometimes not so often.

Q. When your book was balanced for the first time after this transaction were those checks charged against him by the bank?

A. I believe that they were.

Q. Were those checks returned to you by the bank in the usual course of settlements of that sort—where they balance the books they return the checks?

A. Yes, sir.

By Mr. GURLEY: We call upon Mr. Bright to state whether he will take any further testimony-in-chief or whether he has closed.

By Mr. BRIGHT:

A. I don't know.

By Mr. GURLEY: Have you closed?

A. I cannot tell you.

242 DEF'T BARKER EXHIBIT NO. "1."

EXHIBIT NO. "1."

NEW ORLEANS, *Nov.* 6, 1884.

The Louisiana National Bank of New Orleans pay to the order of myself two thousand dollars.

$2,000.00. C. D. BARKER.

Stamped on face: Paid Nov. 5, 1884. Louisiana Nat'l Bank.

Endorsed: C. D. Barker.

DEF'T BARKER EXHIBIT "No. 2."

EXHIBIT No. 2.

NEW ORLEANS, *Nov.* 10, 1884.

The Louisiana National Bank of New Orleans pay to the order of bearer one thousand dollars.

$1,000.00. C. D. BARKER.

Stamped on face: Paid Nov. 10, 1884. Louisiana Nat'l Bank.

DEF'T BARKER EXHIBIT NO. "3."

243 EXHIBIT NO. 3.

NEW ORLEANS, *Nov.* 13*th*, 1884.

The Louisiana National Bank of New Orleans pay to the order of bearer one thousand dollars.

$1,000.00. C. D. BARKER.

Stamped on face: Paid Nov. 13, 1884. Louisiana Nat'l Bank.

United States Circuit Court, Fifth Judicial Circuit, Eastern District of La.

RIO GRANDE RAILROAD CO. *v.* GOMILLA *et als.* } No. —.

Testimony taken before the Honl. E. R. Hunt, examiner, at the office of the clerk of the circuit court of the United States, New Orleans, La., Feb'y 20th, 1886, on behalf of defendant Barker.

Appearances: George L. Bright, Esq., for plaintiff; J. O. Nixon, Jr., Esq., for Barker; Wm. Grant, Esq., for Gurley; J. W. Gurley, Jr., Esq., for Gomilla.

244 CALEB D. BARKER, recalled, says:

By Mr. NIXON:

Q. You were asked at the last session to produce your check book or stub of your check book for the period of time covering November, 1884. Have you got it?

A. Yes, sir. (Witness produces stub of check book called for.)

Q. Now, Mr. Barker, referring to your testimony, I note that you have stated that on the fifth of November you drew a check to bearer for two thousand dollars.

A. Well, I went to the bank and took a check off the desk and drew the money out myself.

Q. Was that check to bearer or to your own order?

A. Payable to my order and endorsed by myself.

Q. Look at this check, No. one (Barker).

A. It is made to my own order and endorsed by myself.

Q. Is that your endorsement on the back of the check? (Check shown witness.)

A. Yes, sir.

Q. Since the last time that we have taken testimony have you exhibited those two mortgage notes to the counsel for the railroad Co.?

A. Mr. Bright?

Q. Yes, sir.

A. Yes, sir.

Q. When? Do you remember?

A. Last Wednesday morning.

245 Q. What day was that?

A. February 17th.

Q. Of this year?

A. Yes, sir.

Q. Where did you show them to him?

A. In his own office.

Q. Who was present?

A. Yourself, and other people that I don't know.

Q. The other people had nothing at all to do with the case?

A. No, sir.

Q. You exhibited the notes to Mr. Bright, the counsel for the plaintiff, in my presence?

A. Yes, sir.

Q. What did you do with them then?

A. Locked them up.

Q. Where?

A. In my bank box.

Q. Is this the only check book that you kept from March, 1884, to March, 1885?

A. From the first day in it——

Q. Which is October, 1883?

A. Until the last day in it—until the present time.

Q. That's the only check book that you have kept?

A. That's the only check book that I have used or owned.

Q. These three checks here for $4,000.00 are entered in this book?

246 A. No, sir.

Q. How is that?

A. I went to the bank and took a check off of the desk and did not enter them in there at all, and there are a good many others in the same way.

No cross-examination.

By Mr. BRIGHT: Counsel for plaintiff now offers in evidence the original check book produced by Mr. Barker.

By Mr. NIXON: Mr. Barker objects to allowing the original book to remain, as it is the check book now in use. He is willing to allow any copy of it to be made or any portion of it to be copied, but he declines to allow the book to be kept in court; further, that he requires the book, so as to balance his account with the Louisiana National Bank, and takes possession of the book and refuses to leave it with the court after having tendered to the counsel for the plaintiff an opportunity to examine it, and having offered to have any copies whatever made from it that the counsel for the plaintiff desires.

Document X Y Z, filed 27 Feb'y, 1886, copied at page 213 of this transcript.

United States Circuit Court, Fifth Judicial Circuit, Eastern District of La.

247 RIO GRANDE RAILROAD CO. *vs.* GOMILLA *et als.* } No. —.

Testimony taken before the Honl. E. R. Hunt, examiner, at the office of the clerk of the circuit court of the United States, New Orleans, La., February 20th, 1886, on behalf of def't Gurley.

Appearances: George L. Bright, Esqr., for plaintiff; J. O. Nixon, Jr., Esq., for def't Barker; Wm. Grant, Esq., for def't Gurley; J. W. Gurley, Jr., Esq., for Gomilla.

J. WARD GURLEY, Jr., Esq., sworn on his behalf, says:

By Mr. GRANT:

Q. You are one of the defendants in this case?

A. I am, sir.

Q. How long have you known the firm of Gomila & Co.?

A. I knew the firm from — its coming into existence until its end—dissolution.

Q. What relation had you to the firm?

A. I was attorney for the firm and a brother-in-law of both

248 of the members of the firm.

Q. Just state whether you had any business for the firm and for Mr. Gomila individually as attorney during that period.

A. I did, during the entire period.

Q. State whether you made a loan at any time to Gomila & Co. or to A. J. Gomila.

A. I did.

Q. State what led up to it—to the loans and dates.

A. The firm of Gomila & Co. became, as I understood, temporarily pressed for money, owing to unexpected, rapid, and large drafts upon them without notice, and Mr. Gomila told me that in order to maintain the credit of the firm and continue prompt payments without heavy sacrifices he would be obliged to borrow money upon his residence.

Q. That's the property in dispute now?

A. Yes, sir; which he objected to doing very much, as he had become very much attached to the place and desired to retain it if possible, and he would greatly prefer, if it was possible, for me to lend him money on the property than to have to go to outsiders. I agreed to endeavor to lend him such money as he absolutely needed from time to time as I could obtain it, provided he would secure me by a first mortgage upon the property. I inquired of him whether it was insured, and for how much, and whether or not he had kept up the payment of the taxes. He showed me that
249 he had and he showed me the receipts. I considered and talked over with him what the property cost and the amount of repairs and improvements that he had put upon it, what its probable cash value was, and what the probability would be of making sale if I would be obliged to have my money back, and finally I consented to lend him the money, and he explained to me over again, what I knew before, that he had never entirely paid for the property that he had purchased from the Hibernia Insurance Company years before for ten thousand dollars, and had paid on account of that purchase from time to time, and the insurance company charged him up with the interest at the rate of eight per cent., I believe, on the unpaid price. He showed me a number of receipts for money that he had paid the insurance company on this purchase price and the interest on the unpaid amount, which I have here, and there appeared to be a balance due the Hibernia Insurance Company of about five thousand dollars—it may be exactly five thousand dollars. The title still remained in the Hibernia Insurance Co. I told him that it would therefore take ($5,000) five thousand dollars to get the property in his hands so that he could mortgage it. "Yes," he says, "but I would not need very much more on the property just now"——

By Mr. BRIGHT: Counsel for plaintiff objects to all of the declarations of Mr. Gomila, and it is agreed that this objection shall apply to all such evidence as may be given by Mr. Gurley relative to the declarations of Mr. Gomila.

250 A. And that in case he should require more money than I would be able to give him on the mortgage he thought that there would be no trouble in getting it from other persons; but he anticipated no such requirement, and thought that a little money

now without having to borrow it on the street or from the banks would entirely re-establish the confidence in his capacity to respond to all demands that might be made upon him during his present embarrassment.

It was agreed that the first five thousand dollars that I should give him should be paid to the Hibernia Insurance Co. for the balance of the purchase price due it, and that as soon as it was paid he should give me a mortgage and place in my hands all of the notes, upon which I should from time to time lend him such money as I could, and if he needed more than I could lend him and if I felt sufficiently secured give him a part of the notes to raise money upon elsewhere.

By Mr. GRANT:

Q. When did you make the first advance to him?

A. I made the first advance to him on the sixth of February, under that agreement.

By Mr. NIXON:

Q. What year?

A. 1884.

By Mr. GRANT:

Q. Is this the check?

251 A. Yes, sir; $3,496.50. That's the check with which it was paid.

By Mr. GRANT: I offer it in evidence, marked Def't Gurley Exhibit No. 1.

No. 18. NEW ORLEANS, *Feb'y 6th*, 1884.

The Louisiana National Bank of New Orleans pay to Mess. Gomila & Co. or order three thousand four hundred and ninety-six & $\frac{50}{100}$ dollars.

$3,496.50. J. WARD GURLEY, JR.

Stamped on face: Paid Feb. 7, 1884. Louisiana Nat'l Bank.

Endorsed: State Nat'l Bank. Feb. 6, 1884. New Orleans, La. Deposit. Gomila & Co.

Q. What was the next advance?

A. It was made on February 11th, 1884, $1,498.50.

By Mr. GRANT: I offer in evidence the check for that, marked "Gurley No. 2."

No. 21. NEW ORLEANS, *Feb'y 11th*, 1884.

The Louisiana National Bank of New Orleans pay to Mess. Gomila & Co. or order fourteen hundred & ninety-eight & $\frac{50}{100}$ dollars.

$1,498.50. J. WARD GURLEY, JR.

252 Stamped on face: Paid Feb. 12, 1884. Louisiana Nat'l Bank.

Endorsed: Deposit. Gomila & Co. Lazirtyn. (Received on deposit Feb. 11, 1884. Union Nat'l Bank.)

Q. When did you receive the mortgage notes, and how many did you receive?

A. After he got the money the transfer was made from the Hibernia Insurance Co. to Gomila before Castell, notary public, and immediately an act of mortgage was passed before Samuel Flower, on the eighth of February, and I rec'd the notes—all of them—the mortgage notes mentioned in the bill in this case, amounting in all to eighteen thousand dollars ($18,000.00), upon the eighth day of February, 1874, or the next day, the ninth. I rec'd them at the office of the notary, as I now remember.

Q. Did you make any further advances?

A. I did. He made one or two calls upon me for advances after that, and I was unable to respond. I did not have the money, and he made, he told me, temporary arrangements with personal friends to borrow money temporarily, and upon the twenty-first day of May, 1884, I advanced another one thousand dollars, and here is the check for it.

By Mr. GRANT: I offer it in evidence, marked "Defendant Gurley No. 3."

253 No. 21. NEW ORLEANS, *May 21st*, 1884.

The Louisiana National Bank of New Orleans pay to Gomila & Co. or order one thousand dollars.

$1,000.00. J. WARD GURLEY, JR.

Stamped on face: (Paid May 22, 1884. Louisiana Nat'l Bank.)

Endorsed: Gomila & Co. P. A. Ponseti.

Stamped: (Received on deposit —— 21, 1884. Union Nat'l Bank.) (Received on deposit May 21, 1884. Union Nat'l Bank.)

A. I found that I was mistaken in the date of the third payment as alleged in the answer. I believe that the answer alleges that the third payment of one thousand dollars was made in the month of February. I can only account for that error from the fact that the other two payments were made in the month of February, and writing the month of February I fell into the error, not having the check before me at the time. I have looked up the check since, and find it was on the 21st of May, and my remembrance, since being refreshed, tells me that it is correct.

Q. Did Mr. Gomila receive the money on these checks?

A. Yes, sir; he did.

Q. Did you have the money in bank at that time to meet these checks?

254 A. The firm rec'd the money. I had the money. The checks are marked "paid" by the bank. The first two

amounts loaned are odd sums, because I did not then have the cash, and I borrowed it myself upon other collaterals of my own for a short period of time, and I gave Mr. Gomila the amounts that I got, less the discounts, and only charged him with the amount that he got—$3,496.50 in one case and $1,498.50 in another case. I borrowed it on my own note secured—I am not sure whether it was secured by my fifty shares of Union Bank stock in the one case or by premium bonds and city six per cent. bonds; it may have been partly secured by ice stock. I borrowed it through Mr. N. D. Coleman, a broker, and have since paid the loans.

Q. State what took place afterwards between yourself and Mr. Gomila in regard to this eighteen thousand dollars of notes.

A. From the day that I rec'd the notes I kept them in my possession, and Mr. Gomila continued to make calls upon me for more money, and I could not give it to him, and from time to time he would make what he called "temporary shifts," hoping that I would be able to give it to him. At last my ability to give him any more money failed, and I told him that I just could not do it, and he asked me then to let him have the two five-thousand notes, one of them due in two years after it was dated and the other one due in three years, as he said that the other two in my hands ($8,000.00) would secure fully the amount of cash that I advanced him—the
255 three sums that I have named—altho' it may not be enough to secure me all of the money that he owed me, particularly the fees, and he said, "I am coming out of this difficulty, and all that I need is a little rest from the pressure that is brought to bear upon me, and if you give me these notes I can raise four or five thousand dollars or maybe more on them, and I will be all right." Well, I thought so myself from all that I knew of his affairs, and I gave him the two notes. I gave them to him or to Mr. Torrey, I am not sure which, but my recollection is that Mr. Torrey transacted all of the business of borrowing money on those notes. At any rate, I returned those two notes.

Q. Are they the notes now held by Mr. Barker?

A. Yes, sir; they are, as I learnt afterwards. I did not know *it* until just before I filed the answer in this case who held those notes. I don't believe that he knew.

Q. Mr. Gurley, was it agreed between yourself and Mr. Gomila and the firm of Gomila & Co. that you should hold these notes for any other purpose than for the loans of money?

A. Yes, sir.

Q. State what it was.

A. When Mr. Gomila was first asking me to lend him this money, before the execution of the mortgage, he says, "You know I owe you some money on the bond transaction." The "bond transaction" was a transaction in which I had given him money to invest in bonds and he had not returned me all of my share of it,
256 and he says, "Besides that, I have not paid you any fees for a long time, and I should like as far as possible, without doing any injustice to any one else, to secure you, so that I would execute a mortgage to you, and what money you could lend me I

think that I could—I would not need many thousand dollars to get out of this scrape, and the balance of the mortgage notes you can hold to secure you for what I owe you until I pay it up."

Q. On what other account was he or the firm of Gomila & Co. indebted to you?

A. On the bond transaction, according to my figures. He never figured it up, altho' I asked him several times to have it figured up, and he always promised to do so, but was always overwhelmed with business, and just did not do it. I figured it up $1,806.45 that he owed me then on that "bond" account. In addition to that I had rendered no account or sent in any bill to the firm for fees since August 4th, 1882. Not only did I charge no fees or collect no bills since that day, but I had advanced costs in a great number of cases for stamps and otherwise.

Q. What fees, what costs, and other disbursements was he indebted to you?

A. I have not got a full and complete statement of all of the fees that he is indebted to him, but I do know that he was indebted to me in the following amounts——

257 By Mr. BRIGHT: I object, on the ground that these amounts are not claimed in the answer.

A. He owed me prior to February sixth, 1884, for costs advanced in the various cases I have referred to, at least fifty dollars ($50.00). I think it is nearer a hundred.

For fee due in the Produce Exchange case	$750 00
Fee due in the case of Gomila & Co. *vs.* Adam Bros. and Adam Bros. *vs.* Gomila & Co., being two separate cases and important ones, bitterly fought both in the lower court and in the supreme court of the State, at least	1,000 00

That is a very reasonable and small fee for the two cases.

Fee due in the case of Lemoine *vs.* Gomila & Co.—there were two cases; the first case I defeated entirely, and the second one I stopped—that is to say, they never got a judgment—say	75 00

That is a low fee.

Fee in the case of Gomila & Co. *vs.* Fuhrer, Boyce & Co. and Gomila *vs.* Western Union Telegraph Co., both cases about the same thing and therefore mentioned together	150

That is a reasonable fee and lower than I ordinarily charge.

Fee in the case of Compagnie Commerciale de Transport Vapeur Francais *vs.* Gomila & Co.	$200

258 This case also went to the supreme court and was tried there and won virtually. It was not an out and out victory, but it — virtually a complete victory.

Fee in the case of the Rio Grande R. R. Co. *v.* Gomila & Co.—I refer to the case in which the Rio Grande R. R. Co. obtained their judgment $500

Fee in the case of the Rio Grande R. R. Co. *vs.* A. J. Gomila *et als.*—I refer to this present case—services up to the time of his death 500 00

Fee in case of George Otto *v.* Gomila & Co. 100

That is a reasonable fee.

Fee in case of Gomila & Co. *v.* Troop & Sons 100

A very reasonable fee and nothing more than a compensation.

Fees in case of Gomila & Co. *v.* Bartlette, Kuhn & Co.... $100 00

Equally reasonable fee.

For the advice and counsel that I gave—it is impossible to specify in detail, and which was almost constant for three years, from August 4th, '82, up to the time of his death, September 8th, 1885—I would say $900.00, or $300.00 per annum, is very reasonable.

In addition to that I paid the State taxes of 1884 on his property—the residence property in question—$63.25.

The circumstances of that payment were these: Mr. Houston, the tax collector, notified him that the property would be advertised for sale if not paid.

Mr. Gomila came to me and said that that was another one
259 of the many mortifications that he was receiving now, and that he did not have the cash to pay it, and that I had better pay it and include it on my mortgage that I held, and he hoped that it would be sufficient to secure me, and I said, Of course I would pay it anyhow and claim and get it out of the mortgage, if there was enough left.

In addition to this, about July, 1884, in the summer of 1884, his little son Arthur went north with my family—that is to say, went north at the same time. As I was buying the railroad ticket for my family he asked me to buy a ticket for his son. I bought it and paid for it. It was half of a Niagara excursion ticket, and my recollection is that it cost 22, either 21 or $22.00, and he said that he would give me back the money, but he did not do so. He referred to it a number of times afterwards, and at last he told me that unless I absolutely needed the money to let it go on the mortgage, on my acc't, and it is yet unpaid.

Now, there are several other suits, I think, in which fees are due me, but I have not yet made up any statement of item.

I wanted to say that there has been paid me, as was shown by the books of Gomila & Co. when they were being examined in this case, five hundred and something—I don't remember the amount; $561, I think—from the sale of some lots which he purchased in
Idaho Springs years before, and when he gave me the check
260 he said, "I have rec'd this money from the lots, and it is really outside of my business, and I want to pay you that on account of the money that I owe you on the bond transaction, which I ought to have paid you before," and he says, I wish you

would take it and credit me with it. It is therefore to be credited on the $1,806.45 that I have before spoken of.

Now, as to that Idaho property, I think it was in the summer time of 1883; I don't know that exactly; it may have been 1882; maybe it was earlier; I really don't know now; anyhow, several years prior to 1884 Mr. Gomila and his family went to Colorado on a short visit, and while there purchased some lots in Idaho Springs. Upon his return they were very enthusiastic about the country and the value of these lots, and he said that he had bought them for his boys; that Idaho Springs was going to be a great watering place, and that that was a great country, and that these lots which he had bought for $20 and $30.00 apiece would be worth a great deal of money, and my wife, who was his sister-in-law, said that she wanted two of those lots, and he said he would sell them for what he paid for them, and I gave him $50.00 for the two lots and the expenses that might be incurred for the passing of title, and he kept the $50.00, and he was to have given me a deed for the two lots, but never did so. I never asked for it and he never thought of it, but my wife always considered that she owned those two lots.

261 Now, in addition to giving me the five hundred and odd dollars that he realized from the sale of some of these lots, he also gave me—he wanted to give me a deed for all of the balance of the lots to secure the money due me on the bond transaction, which seemed to trouble him a great deal.

I told him that I did not have the faith in those properties that he had. Well, he says that's the best he could do, anyhow, and might just as well take it. I told him that I was unwilling to take it except as a collateral, and he wanted me to take it in settlement, and he estimated that they were worth $1,900.00, about, and he wanted me to take that $1,900 in settlement of what he owed me on the bond transaction, and I said, How much is it? and he said he never figured it out, but it is about $1,750; but, as I told you before, I make it $1,806.45 after figuring it out.

It was finally agreed that he would give me the title, with the understanding that I would hold it as collateral only, and I did not take it in settlement, so he gave me the title to it, and here it is. The amount named in it is $1,900. On the back of the envelope I find that he has marked it in his handwriting, "To Gurley, as collateral, except $1,750." The payment of $500 is put down here as "$598 on account," and written underneath, and afterwards——

By Mr. BRIGHT:

Q. What's the use of this?

A. Well, you wanted everything and I am trying to give it to you. That property is still there. God knows what it is
262 worth; I don't know. The taxes are not paid on it, and I don't know that it is still in my name—that is to say, I have paid no taxes and he has paid none since. The only receipts I can find are those of '82 and '83.

By Mr. GRANT:

Q. The fees which you have enumerated are yet unpaid and are due?
A. Yes, sir; they are; every cent of them
Q. You have never been reimbursed the expenditures?
A. Never have, except as I have stated.

By Mr. NIXON:

Q. You have paid the taxes for 1884 on this property in dispute?
A. Yes, sir.
Q. What was the assessment for that year?
A. Ten thousand dollars.
Q. Just to make your testimony a tittle clearer on the subject—you advanced this money and I notice that you gave checks to Gomila & Co.?
A. Yes, sir.
Q. You were dealing with Gomila & Co.?
A. Yes, sir.
Q. Not with either particular individual, but with the firm?
A. Yes, sir.

By Mr. GRANT:

Q. The title to the property was in the name of A. J. Go-
263 mila, individually?
A. Yes, sir.

By Mr. NIXON: Counsel for Mr. Barker and the counsel for Mr. Gurley, def'ts, each announce that they have closed the case on behalf of their clients, and they request from counsel for the plaintiff to state if he has any other evidence.

By Mr. BRIGHT: I have not closed the case and I do not close the case.

Continuance.

Extracts from the Minutes.

NEW ORLEANS, *Saturday, April 17th*, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings.

RIO GRANDE RAILROAD CO. }
vs. } No. 11013.
A. J. GOMILA *et als.* }

This cause, continued from yesterday, came on this day further to be heard and was further argued by the counsel for the parties, respectively, and continued for further hearing until Monday, the 19th instant, at 10 a. m.

264 *Continuance.*

Extract from Minutes.

NEW ORLEANS, *April 19th*, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, dist. judge.

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et als.*
No. 11013.

On motion of counsel for parties, respectively, with leave of the court first had and obtained, it is ordered that this cause be continued until Thursday, the 22nd instant, at 10 a. m.

Continuance.

Extract from Minutes.

NEW ORLEANS, *Thursday, April 22nd*, 1886.

Court met at 9 o'clock a. m.
Present: Hon. Edward C. Billings, dist. judge.

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et als.*
No. 11013.

265 By consent of counsel for the respective parties, with the leave of the court first had and obtained, it is ordered that this cause be continued until Friday, the 30th instant.

Continuance.

Extract from Minutes.

NEW ORLEANS, *Friday, April 30th*, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et als.*
No. 11013.

This cause not having been reached to-day for want of time, it is ordered by the court that the same be continued.

Motion to Fix Cause for Trial.

Extract from Minutes.

NEW ORLEANS, *Thursday, May 27th*, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

266 RIO GRANDE RAILROAD CO. *vs.* A. J. GOMILA *et als.* } No. 11013.

On motion of Rouse & Grant, solicitors for defendants, it is ordered that this cause be set down for hearing for Wednesday, June 2nd, at 10 a. m.

Continuance.

Extract from Minutes.

NEW ORLEANS, *Wednesday, June* 2, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

RIO GRANDE R. R. Co. *vs.* GOMILA & Co. } 11013.

By consent of counsel for the respective parties this cause is continued until Saturday, June 12, 1886, at 10 a. m., for hearing.

Continuance.

Extract from Minutes.

267 NEW ORLEANS, *Saturday, June* 12, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

THE RIO GRANDE R. R. Co. *vs.* A. J. GOMILA *et als.* } 11013.

This cause not having been reached to-day for want of time, ordered that said cause lay over until Monday, the 14th inst., at 10 a. m.

Cause Submitted.

Extract from Minutes.

NEW ORLEANS, *Monday, June* 14, 1886.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et als.*
No. 11013.

This cause, as continued from yesterday, was this day resumed, and after hearing further argument from counsel for the
268 respective parties said cause was submitted, when the court took time to advise.

Decree. Entered and Filed June 15th, 1886.

U. S. Circuit Court, Eastern Dist. of La.

THE RIO GRANDE RAILROAD CO.
vs.
A. J. GOMILA *et als.*
No. 11013.

This cause came on to be heard at this term upon complainant's bill and its amendment, the defendants' answers and the replication thereto, and the evidence adduced in the cause, and was argued by counsel; thereupon, and in consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the mortgage from A. J. Gomila to secure the notes held by the defendant, J. Ward Gurley, Jr., was executed in good faith and without any intent to defraud creditors, and was and is valid and made for the purpose of enabling A. J. Gomila & Co. to raise funds for use in their business.

2. That the defendant, J. Ward Gurley, Jr., acquired the two notes held by him for the sum of $8,000 before maturity, *bona fide*, and for value; that he loaned the sum of $5,995 to said A. J.
269 Gomila at or about the time he received the notes, five thousand dollars of which was used to pay so much of the purchase price of the property mortgaged and borrowed for that purpose, and the balance of said sum was subsequently loaned at the request of Gomila & Co.; that subsequently to the first loan and before maturing of said notes and before complainant obtained his judgment said Gomila & Co. gave said Gurley a further right of pledge upon said notes to secure moneys advanced and costs of court advanced and fees due as attorney for them to the amount of $6,315.70, subject to a credit of $566.65, and the said Gurley is entitled to hold said notes to secure said loans, fees, and advances, and to collect the same and apply the proceeds to that purpose with full benefit of the said mortgage.

3. That the defendant, Caleb D. Barker, acquired said two notes in the sum of $10,000, set forth in his answer, before maturity, *bona fide*, and for value, from the firm of A. J. Gomila & Co. to secure loan of $4,000, actually made by him to said firm, as alleged in his answer, and that he is entitled to hold said notes with full benefit of the mortgage to secure said sum, with interest, and to collect the amount thereof and apply the proceeds to the payment of such loan and interest.

That the court is satisfied that the advances of the said J. W. Gurley, Jr., and of the said Caleb D. Barker were made honestly and in good faith.

4. And it is further ordered that complainant's bill, save
270 as to the extent of this decree, be dismissed at complainant's cost.

5. And that, except as relates to the said J. W. Gurley, Jr., and to the extent hereinbefore provided, and as relates to the said Caleb D. Barker, and to the extent herein provided, the bill of complainant be maintained.

(Signed) EDWARD C. BILLINGS, *Judge.*

June 15, 1886.

Motion for Appeal.

Extract from Minutes.

NEW ORLEANS, *Tuesday, June* 15, 1886.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

THE RIO GRANDE RAILROAD CO.
vs.
GOMILA & CO. *et al.* } No. 11013.

On motion of Geo. L. Bright, solicitor for the complainants, and on stating to the court that the said complainants are aggrieved by the judgment rendered and signed on 15th June, 1886, against them, and that there is error in said judgment to their prejudice, it
271 is ordered that an appeal, to operate as a supersedeas, be allowed complainants herein, returnable before the hon. the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October, A. D. 1886, upon complainants giving bond and security according to law in the sum of five hundred dollars ($500).

Bond for Appeal. Filed 15th June, 1886.

No. 11013.

UNITED STATES OF AMERICA:

Know all men by these presents that we, The Rio Grande Railroad Company and Ch's Maduell, are held and firmly bound, jointly and severally, unto P. S. Wiltz, Jr., public administrator and dative

test'y executor of A. J. Gomila; Jno. J. O'Brien, the recorder of mortgages for the parish of Orleans; Larned Torrey, J. W. Gurley, Jr., C. D. Barker, and all others in interest in the sum of five hundred ($500) dollars, lawful money of the United States of America, to be paid to the said defendants and all others in interest, heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

272 Sealed with our seals and dated the 15th day of June, in the year of our Lord eighteen hundred and eighty-six.

Whereas the said The Rio Grande Railroad C'p'y having heretofore, to wit, on the 15th day of June, 1886, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered and signed on the 15th day of June, 1886, by the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, in the suit of The Rio Grande Railroad Company *vs.* A. J. Gomila and the recorder of mortgages and others, No. 11013 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden The Rio Grande Railroad Company shall prosecute their said appeal to effect and shall answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) THE RIO GRANDE RAILROAD COMPANY, [L. S.]
By their solicitor, GEO L. BRIGHT.
(Signed) C. MADUELL. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) JOHN DEVONSHIRE.

[On margin:]

Bond approved.
(Signed) EDWARD C. BILLINGS, *Judge.*
June 14, 1886.

UNITED STATES OF AMERICA, } ss:
District of Louisiana, }

Personally appeared Charles Maduell, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides — New Orleans and is worth the full sum of five
273 hundred dollars over and above all of his debts and liabilities and property exempt from execution.

(Signed) C. MADUELL.

Subscribed and sworn before me this 15th day of June, 1886.
(Signed) JOHN DEVONSHIRE, [SEAL.]
Commissioner U. S. District Court, District of Louisiana.

274 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 273 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Rio Grande Railroad Co. *vs.* A. J. Gomila *et als.*, No. 11013 of the docket of the said court.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

Witness my hand and the seal of said court, at the city of New Orleans, this 16 day of September, A. D. 1886.

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 16 day of September, A. D. 1886.

EDWARD C. BILLINGS, *Judge.*

Endorsed on cover: E. Louisiana C. C. U. S. No. 388. The Rio Grande Railroad Company, appellant, *vs.* P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, *et al.* Filed October 2, 1886.

Supreme Court U. S.
FILED.
NOV 11 1889
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES

No.

RIO GRANDE RAILROAD COMPANY,
APPELLANT,

versus

P. S. WILTZ, DATIVE TESTAMENTARY EXECUTOR OF A. J. GOMILA, AND OTHERS, APPELLEES.

Appeal from the Circuit Court for the 5th Circuit and Eastern District of Louisiana.

BRIEF FOR PLAINTIFFS AND APPELLANTS.

GEORGE L. BRIGHT,
Solicitor for Complainants and Appellants.

T. H. Thomason, Printer, New Orleans.

SUPREME COURT OF THE UNITED STATES

No.

RIO GRANDE RAILROAD COMPANY,

APPELLANT,

versus

P. S. WILTZ, DATIVE TESTAMENTARY EXECUTOR OF A. J. GOMILA, AND OTHERS, APPELLEES.

Appeal from the Circuit Court for the 5th Circuit and Eastern District of Louisiana.

BRIEF FOR PLAINTIFFS AND APPELLANTS.

[The references in this Brief are to the Printed Record.]

STATEMENT AND PLEADINGS.

The plaintiffs, in their petition, state that on the 5th January, 1885, they obtained a judgment before the United States Court, for the Fifth Circuit and Eastern District of Louisiana, against the firm of Gomila & Co., and the individual members thereof, Anthony J. Gomila and Larned Torrey, *in solido*, for

$26,731.97, twenty-six thousand seven hundred and thirty-one 97-100 dollars, and interest.

That on the 17th January, 1885, they recorded the judgment in the Mortgage Office for the Parish of Orleans, and it thereby became a judicial mortgage on all the immovable or real property of Gomila & Co., Anthony J. Gomila and Larned Torrey, in the Parish of Orleans. Civil Code of La., Arts. 3321, 3322.

At the time the judgment was recorded and became a judicial mortgage, Gomila was the owner of a certain portion of ground in the City of New Orleans, and the judgment became a judicial mortgage on it.

But there is inscribed ahead of this mortgage in the books of the Recorder of Mortgages against Gomila, and against this property, an inscription of a mortgage made by Gomila in favor of his firm, Gomila & Co., on February 8th, 1884, to secure eighteen thousand dollars ($18,000), which Gomila, in the act, stated he owed for moneys advanced and loaned to him by the firm of Gomila & Co. on February 8th, 1884, and for which he made his four promissory notes to his own order, and endorsed by himself; three for five thousand dollars ($5000) each, and one for three thousand dollars ($3000). The three notes for $5000 each, payable, respectively, one, two and three years after date, and the $3000 note, payable three years after date, in all, $18,000.

The plaintiffs allege that by virtue of an alias writ of execution, issued on their judgment, they caused

the Marshal to seize the aforesaid property of Gomila; that the seizure and sale of this property are obstructed and prevented by the aforesaid mortgage for $18,000.

They allege that this mortgage is fictitious; is a fraud and a sham, and a simulation committed by Gomila to cover his property, and to prevent the seizure and sale of it; that it is not true, as stated in the act of mortgage, that on the 8th of February, 1884, the firm of Gomila & Co. loaned and advanced to A. J. Gomila the sum of eighteen thousand dollars, or any other sum of money, and therefore the mortgage and the notes are null. That after this fraudulent mortgage was made, the notes were received by Larned Torrey, the person who accepted the mortgage, and were surrendered to Gomila, and they have, ever since, been in his custody and under his control, or in the custody and control of some confederate, whom, when discovered, your petitioners will pray leave to make a party to the suit. The prayer of the petition is, that a preliminary injunction issue, enjoining and prohibiting Gomila from parting with, and disposing of, in any way, the said four promissory notes, and that judgment be rendered in favor of petitioners, canceling and annulling and erasing from the books of the Mortgage Office, this mortgage for eighteen thousand dollars ($18,000), and that Gomila be ordered to surrender the four promissory notes, pages 1 to 3.

This suit was originally instituted in the State Court, but was removed to the Circuit Court of the United States. The removal was made by Anthony

J. Gomila, upon a petition signed by J. Ward Gurley, Jr., his attorney, p. 6. It was removed for the benefit of Mr. Gurley. In the Circuit Court Gomila appeared, and in his answer admitted the making and executing of the mortgage, and averred that the mortgage was a true, real and *bona fide* mortgage, executed and given for a valuable consideration, in due course of business; and that the said notes described in and secured by said mortgage are not now, and have not, at any time since the issuance thereof, been in the possession or under the control of this defendant, and he specially denied that the mortgage is fictitious, or a fraud, committed by him to cover his property, as charged by the plaintiffs. He alleges that the plaintiffs were advised before the execution of the said mortgage of the exact condition of the title, and his interest in the property, and that the plaintiffs were also advised of the mortgage, and the reason and the necessity thereof, and the use to which the money derived therefrom was put, and he reserves his right to sue the plaintiffs and their agents for damages.

We call the attention of the Court to the fact that it is alleged in this answer that the mortgage was made at the time it was made, for a true, real, *bona fide* and valuable consideration, and that the answer is signed by J. Ward Gurley, Jr., the attorney for Gomila, who is a party defendant in this suit.

We call the attention of the Court to the fact that this answer does not disclose the holders and owners of the notes; that neither Gomila, nor his attorney,

Gurley, disclose in that answer the names of the holders and owners of the note, pages 8 and 9.

The plaintiffs, in order to ascertain who were the actual holders and owners of those notes, so as to make them parties to this suit, filed a supplemental bill, and propounded interrogatories to Gomila. The first interrogatory to Gomila is as follows, p. 14: "To whom did you deliver the notes described in the original bill on file, and when did you do so? Give his full name and address."

He answered, p. 14:

"The notes were all delivered to Larned Torrey, the other member of the firm of Gomila & Co., when they were made or executed, February 8, 1884."

The second interrogatory was:

"In whose possession have the said notes been at all and any time up to the present time?"

He answered:

"The said notes were immediately thereafter delivered to J. Ward Gurley, Jr., of this City, from whom Gomila & Co. received the following sums of cash, namely:

On the 6th February, 1884, $3496.50
On the 11th February, 1884, 1498.50
On the 20th February, 1884, 1000.00

besides some City bonds, at various dates just before and subsequently, other small sums of money for costs in different suits, etc., all of which is still due said Gurley, with interest thereon; that $5000 of said sums of money was obtained from said Gurley for the purpose

and to use it to pay the balance of the purchase price of the property in question to the Hibernia Insurance Company.

"That some months after the said notes were delivered to said Gurley, two of them, namely, the note for $5000, due in two years after its date, and the note for $5000, due in three years after its date, were withdrawn from said Gurley by Gomila & Co. through said Torrey, and pledged on 21st August, 1884, with and to the Tentonia Insurance Co. of this City, to secure the loan then made by said Insurance Co. to Gomila & Co. for $5000 in cash; that on the 3d Sept., 1884, the said loan was renewed with said Insurance Co.; and on the 10th October, 1884, the said loan for $5000 was renewed in the State National Bank of this City, and said two mortgage notes were withdrawn by Gomila & Co. through said Torrey from said Insurance Co. and pledged with and to the State National Bank to secure said loan. Subsequently, Gomila & Co. through said Torrey withdrew said two notes from the State National Bank, and placed them with C. D. Barker of this City, on or about the 3d of November, 1884, from whom said firm of Gomila & Co. received through said Torrey the sum of $2000 in cash Nov. 3, 1884, and the additional sum of $1000 in cash Nov. 5, 1884; and the additional sum of $1000 in cash Nov. 7, 1884.

"And so far as deponent knows, the last two mentioned notes are still held by said Barker, and the other two notes, one for $5000, due in one year after

its date, the other for $3000, due in three years after its date, are now and have always been held by said Gurley, since they were delivered to him as aforesaid."

To the third interrogatory, which is as follows:

"Who is now the holder of the said notes? Give his name and address." He answers: "This interrogatory is answered by the answer just given," pages 14 and 15.

This answer is signed and sworn to by A. J. Gomila, and it is fair to presume that it was written by his attorney, J. Ward Gurley, Jr.

We call the attention of the Court to the difference existing between the original answer of Gomila, signed by his attorney, J. Ward Gurley, Jr., on pages 8 and 9, and these answers to the interrogatories.

In the answer of Gomila, signed by Mr. Gurley, attorney, it is stated that the mortgage was, at the time it was given, given for a real, true, *bona fide* and valuable consideration in due course of business, and that it was for $18,000 loaned on the 8th of February, 1884, by the firm of Gomila & Co. to Anthony J. Gomila, but in the answers to the interrogatories, that consideration is wholly ignored or impliedly denied, and it is stated that the notes were immediately thereafter delivered to J. Ward Gurley, Jr. of this City, from whom Gomila & Co. received the following sums in cash, namely:

On the 6th February, 1884, $3496.50
On the 11th February, 1884, 1498.50
On the 20th February, 1884, 1000.00

besides some City bonds, at various dates, just before and subsequently other small sums of money for costs in different suits, all of which is still due said Gurley, with interest thereon. "Five thousand dollars of said sums of money was obtained from said Gurley for the purpose and used to pay the balance of the purchase price of the property in question to the Hibernia Insurance Co." p. 14. These are important differences and contradictions to which we will refer hereafter.

The plaintiffs then by a supplemental bill made J. Ward Gurley, Jr., and C. D. Barker parties defendants to this suit, pages 16 and 17. Gurley appeared and denied that the mortgage is fictitious, and is a simulation and a fraud, committed by Gomila to cover his property and prevent the seizure and sale thereof by his creditors, and he denied that the notes are, or were in the possession, custody or control of Gomila, or some of his confederates, as alleged, and he alleged that the allegations were, and are untrue, p. 16.

"He specially avers that the answers made and filed by Gomila are true and correct, and that said notes are held, as stated, at least those stated to be held by him, Gurley, and he averred that the mortgage is true, legal and sufficient. By this we have him well bound by the original answer of Gomila. For further answer, he states that on the day the mortgage was made, or executed, Feby. 8th, 1884, or thereabouts, all of the said four notes, described in said bill, were delivered to him by Larned Torrey, a member of the firm of Gomila & Co. That part of said notes were then entirely

acquired by this defendant from him in consideration of money, hereinafter stated, which he paid to the firm of Gomila & Co. in cash, and the rest of said notes were left in his possession as security for further sums which he expected to advance to Gomila & Co.; that this defendant paid to and advanced for said Gomila & Co. in consideration of the two of the said mortgage notes now held by him, and hereinafter more specially designated, the following sums in cash, viz:

On the 6th February, 1884, $3496.50
On the 11th February, 1884, 1498.50
On the 20th February, 1884, 1000.00

besides some New Orleans City bonds, at various dates just before the date of said mortgage, and subsequently other small sums of money for costs in different suits, which together with interest due on all said sums of money and the taxes paid by this defendant, upon said mortgage, property and the fees which were due to this defendant by said Gomila & Co., and the said Gomila, at the time of the execution of said mortgage, and which said mortgage and notes were intended in part to secure, amount in all to more than the amount of the said notes now held and owned by this defendant."

"He avers that the $5000 of said sum of money were advanced by this defendant to enable the said A. J. Gomila to pay the Hibernia Insurance Co. a balance due it for the purchase price of said property, and that this defendant is informed and believes that

the said $5000 were so paid to the said Hibernia Insurance Co. for said balance of the purchase price, for that portion of the said advance, this defendant's claim is in the nature of a vendor's lien, and he has the same rank and privilege upon said property for said sum as a vendor has for the purchase price."

Here, we have again a great discrepancy from the original answer of Gomila, written by Gurley, and afterwards asserted by Gurley to be a correct and truthful answer. The original answer stated that the act of mortgage was for the consideration therein expressed, and this answer says the consideration stated in the act of mortgage is false, and it sets up another and very different consideration than that which is stated in the act of mortgage Gurley now states that all the notes were acquired by him on or about 8th Feby., 1884, and the fact is, by his answer, they went into his possession after the 8th Feby., whereas, up to that time, he only pretends to have advanced upon them on the *6th of Feby.*, $3496.50.

Before this he had stated that the $18,000, the amount of the mortgage, were actually loaned to Gomila by Gomila & Co.; now he says that the notes were acquired by him to secure some of the money that he had loaned and expected to loan to Gomila & Co. The whole amounts loaned by him which he specified in his answer are the sums of $3396.50, $1498.50 and $1000, making $5995, for which he claims the ownership of the mortgage notes, amounting to $18,000. It is true that, in his answer, he says that

he advanced City bonds and other sums of money for costs in different suits and taxes and fees due him by Gomila & Co. and to Gomila at the time of the execution of the mortgage, and that the mortgage and notes were intended in part to secure him, and that these sums amount to more than the amount of the notes now held and owned by him.

Now, the Court will notice not only the change made as to the consideration of these notes, but the fact that no specified amount of the bonds, taxes nor fees are alleged, and the impossibility from the evidence (which we will quote hereafter) and the theory of the defense that Gurley ever acquired these notes in good faith, and the Court will conclude that these are all artifices to give existence to the notes and mortgage that were originally null and void and simulated.

Gurley, in his answer, further says, that some months after the four mortgage notes were delivered to him by Gomila & Co., Gomila & Co. applied to him for further advances of money in addition to the sums hereinbefore mentioned; and he being unable to furnish any more money, Gomila & Co. requested him to return to them two of said notes, one for $5000, due in two years after date, and one for $5000, due in three years after date, in order that they might obtain more money upon said notes from someone else, and he did so return and deliver the said two notes to Gomila & Co., through Larned Torrey, one of the partners, and he retained the other two of said

mortgage notes, one for $5000, due in one year after its date, and one for $3000, due in three years after its date, and he is the true, legal and sole holder and owner of the said last two mentioned notes, and has never parted with them, or allowed them to get out of his possession or from under his control since they were first delivered to him on February 8th, 1884, or thereabouts.

We call the attention of the Court to the discrepancy existing between this answer and the answer of Gomila, p. 8. We say the answer of Gomila is binding upon Mr. Gurley, because these defendants are all charged as confederates, and because the answer of Gomila is signed by Mr. Gurley; and that answer says that this mortgage was made and the notes were executed for a valuable consideration, which means the consideration in the act, in due course of business, and that the notes and the mortgage are not now and have not, at any time since the issuance thereof, been in the possession or under the control of this defendant; whereas, Gurley now in his answer says, that some of these notes, namely, the one for $5000, due in two years after date, and the one for $3000, due in three years after date, were by him returned and delivered to Gomila & Co. through Larned Torrey, one of the partners. In Gurley's answer he claims to be the true, legal and sole holder and owner of the two notes, one for $5000 and one for $3000, when the facts disclosed by him in this answer would only make him the holder of them as collateral security for any

indebtedness that might exist to him. If the facts stated in his answer were correct, and he had no intention of covering Gomila, he would not have claimed the ownership of the notes, but only the amount alleged to have been advanced by him, and he would have given the benefit of the surplus to the plaintiffs in this suit, whereas, he claims the right to protect this property, by this mortgage, for more than he actually claims in his answer. Gurley, moreover, alleges in his answer that the notes were acquired by him for a valuable and full consideration as aforesaid, and that they were issued in the interest and for the benefit of said Gomila & Co. and their creditors to enable them to continue business, and no part of this defendant's said advances has ever been returned or paid, and the said notes for the full amount thereof are still justly and truly due this defendant.

We will not comment upon this part of the answer, because it does not conflict with the pleadings, and we are now only considering the pleadings, and the conflicts between them, otherwise than to say that we cannot, and do not understand how the full amount of the notes are "justly and truly due," when the notes largely exceed any pretended advances.

Gurley for further answer says: "that even if said mortgage was executed and the said notes issued to said defendant, Gurley, for the sole purpose of securing a just debt, although the debtor was insolvent, to the knowledge of the creditor, with whom he contracted, and although the other creditors are injured thereby,

the said mortgage and notes could not be set aside and canceled because said mortgage and notes were executed and issued and said contract of payment was made more than one year before the bringing of any suit to avoid the same as provided by Art. 1987 of the Civil Code of La., and this defendant Gurley avers, that to the extent and for the amount in which the said mortgage notes now held and owned by him, as aforesaid may be, and are in excess of his advances, as aforesaid, they were issued and given to him on or about the said 8th day of February, 1884, to and for the purpose of securing a just debt then due this defendant, and a greater amount than the said balance or excess of said notes over and above said advances."

This is a very obscure allegation, but we will consider it as we understand it. He says "the notes were given to him on or about 8th of Feby., 1884, to and for the purpose of securing a just debt then due this defendant, and a greater amount than said balance or excess of said notes over and above the said advances," but in the previous part of his answer he only claims, that "on or about the 8th of February, 1884, he advanced $3496.50." It therefore appears by this answer that these notes for $18,000 were given to him, and he claims to be the owner of them in full, to secure advances which he does not pretend on the 8th of February, 1884, to have exceeded $3496.50.

The whole answer does not set forth a clear and unambiguous statement of the nature of the right claimed

by him now or at any time to the notes, amounting to $18,000.

Sometimes he treats the notes as if he was made the sole owner of them by reason of an ambiguous transaction; then that he is not owner and he returns a portion of them to Gomila, and sometimes he give us to infer (though he at no time says so), that the notes were given to him as collateral security. All this uncertainty and ambiguity in his answer, we think, is for the purpose of claiming the full ownership of the notes in case he fails to establish the amount of advances for which he pretends to hold the notes as collaterals.

That he has this object in view will more clearly appear when we consider the claim of Barker, the other defendant, to the notes held by him.

During the pendency of this suit, Gomila died, and his representatives were made parties to the suit.

We now come to the answer of C. D. Barker. C. D. Barker claims the ownership of two notes, each for $5000; he denies that the mortgage is fictitious, or is a fraud, committed by Gomila to cover his property. He denies that the notes were surrendered by Torrey to A. J. Gomila, and were thereby cancelled. He denies that they have been in the custody or under the control of A. J. Gomila, or some of his confederates. He alleges that the mortgage was made for the sum of $18,000, which was represented by four notes. He alleges that on the 6th of Nov., 1884, the two notes

for $5000 each were pledged and deposited with him by Larned Torrey to secure the loan made on that date in cash for the sum of $2000, which sum in cash was paid to Larned Torrey at that time, a member of the firm of A. J. Gomila & Co.; that subsequently, to-wit: on the 10th of Nov., 1884, this defendant lent the said Torrey $1000 in cash, and on the 13th of Nov., 1884, this defendant lent the said Torrey $1000 in cash, the payment of all of which sums was by agreement at that time, to be secured by a pledge of the said two above described notes, and that the notes have been ever since the 6th of Nov., 1884, in the actual possession of this defendant, except one time for a few hours of a day in the month of November or December, 1884, when they were placed in the possession of Torrey, as agent of this defendant, for the purpose of endeavoring to secure an advance upon them for the purpose of repaying this defendant. That said efforts were unsuccessful and the said notes were immediately returned to this defendant, and have been in his possession ever since; that said Torrey, finding that he was unable to negotiate said notes elsewhere, and was unable to raise the loan upon them for the purpose of paying this defendant, agreed with this defendant, that if the said loan was not repaid on or before the 1st of January, 1885, *the notes should become the property of this defendant*, and the said loan was not repaid on or before the 1st of January, 1885, or any portion thereof, and has not been paid at any

time, or any portion thereof, *and the said notes are now the property of this defendant.*

The Court will notice that Barker, for his pretended advances, amounting to $4000, says that the notes were at first pledged to him to secure the advances, and he afterwards says that by an agreement, because the advances were not paid at maturity, it was agreed that the two mortgage notes for $10,000 should become wholly his property. Thus, we have it that Gurley for advances he pretends to have made claims that the whole amount of the mortgage notes in his possession belong to him, and Barker also claims that the whole amount of the mortgage notes in his possession, belongs to him. These notes amount to $18,000, and although the actual claims of Gurley and of Barker may not be found sufficient to cover the property, they pretend to have acquired these notes of $18,000 in good faith, and in the usual course of business; in other words, that it is the usual course of business for a man to loan a small sum of money upon a large note, secured by mortgage, and for the parties afterwards to agree, to the injury of creditors, that the parties lending the money should become the owner of the whole amount of the notes and mortgage, though the notes may largely exceed any indebtedness to them.

The parties defendants in this suit are A. J. Gomila, his brother-in-law, Larned Torrey; his brother-in-law and attorney-at-law, J. Ward Gurley, Jr.; and C. D. Barker, his intimate friend, and the broker of Gomila

& Co. from the time the firm of Gomila & Co. came into existence until it failed. The cause was submitted to the Circuit Court on the 14th of June, 1886, and the next morning the Circuit Judge rendered a judgment in favor of defendants.

The Circuit Court found:

Firstly. That the mortgage from A. J. Gomila to secure the notes held by J. Ward Gurley, Jr. was executed in good faith, without any intent to defraud the creditors, and was and is valid and made for the purpose of enabling A. J. Gomila & Co. to raise funds for use in their business.

Secondly. That the defendant, J. Ward Gurley, Jr., acquired the two notes held by him for the sum of $8000 before maturity, *bona fide*, and for value; that he lent the sum of $5995 to said A. J. Gomila, $5000 of which was used to pay so much of the purchase price of the property, mortgaged and borrowed for that purpose and the balance of said sum was subsequently lent at the request of Gomila & Co.; that subsequent to the first loan and before the maturing of said notes and before complainant obtained his judgment, said Gomila & Co. gave said Gurley a further act of pledge upon said notes to secure moneys advanced and costs of court advanced and fees due as attorneys for them to the amount of $6315.70, subject to a credit of $566.65, and the said Gurley is entitled to hold said notes to secure said loans and fees ad-

vanced, to collect the same and to apply the proceeds for that purpose for the benefit of that mortgage.

Thirdly. That defendant, Caleb D. Barker, acquired the said notes in the sum of $10,000, set forth in his answer, before maturity, *bona fide*, and for value from the firm of A. J. Gomila & Co. to secure the loan of $4000, made by him to said firm, as alleged in his answer, and that he is entitled to hold said notes for the full benefit of the mortgage to secure said sum, with interest, and to collect the amount thereof, and to apply the proceeds to the payment of said loan and interest; that the Court is satisfied that the advances of J. Ward Gurley, Jr. and of Caleb D. Barker were made honestly and in good faith.

Fourthly. It is further ordered that complainants' bill, as far as it extends to this decree, be dismissed at complainants' cost.

Fifthly. And that except as relates to J. Ward Gurley, Jr. to the extent hereinbefore provided, and as relates to Caleb D. Barker to the extent provided, the bill of complainant be maintained, pages 147 and 148.

From this judgment the complainants have appealed.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in finding that the mortgage made by Gomila was executed in good faith, and without any intent to defraud creditors, and was made for the purpose of enabling A. J. Gomila & Co. to raise funds for use in their business.

2. That Gurley acquired the notes *bona fide;* that he loaned $5,995 to Gomila, five thousand dollars of which was used to pay for the property; that the notes were pledged to him to secure $6,315.70 more.

3. That Barker acquired the notes for value; that he loaned $4,000; that he is a *bona fide* holder.

The Circuit Court should have found:

1. That the the mortgage was originally a fraud of the defendant to cover his property from the execution of his creditors.

2. That Gurley and Barker gave no consideration for the notes; and if they did, they had notice that the mortgage was a fraud committed by Gomila to defraud his creditors.

3. That Gurley and Barker had notice that the mortgage was extinguished by confusion.

The Argument.

Before proceeding to the facts of the case, we propound the following rules of law:

Firstly. The rule of the law is, an assignee, before the maturity of a negotiable note, secured by mortgage, takes the mortgage as he takes the note, free from objections, to which it was liable in the hands of the mortgagee. *Carpenter vs. Logan, 16 Wall. 278; Sawyer vs. Pritchett and wife, 19 Wall. 165; Succession of Delohonde, 21 La. An. 8.*

Secondly. But the holder must be an innocent holder, without knowledge of the objections to the

mortgage. It is settled that if anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with the knowledge of all that the inquiry would have disclosed. *2d Pomeroy's Equity Jurisprudence, Vol. 2, Sec. 608.*

Thirdly. Where the notes secured by mortgage and delivered by the maker have come again into his hands, before maturity, the mortgage is extinguished by confusion. By reissuing the note he may bind himself, but cannot revivify the mortgage securing it. *Hill vs. Hall, 4 Robinson, 416; Doll vs. Rizotti, 20 La. An. 264.*

Fourthly. When a note and mortgage are transferred to one who well knows that it is a mere simulation to protect the property, he cannot afterwards, by paying the maker of the note, revivify the mortgage that never existed. *Richard vs. Oviere, 10 La. An. 723.*

The mortgage is a fraud, and neither Gurley nor Barker gave any real consideration for it. The mortgage was made to protect the property from seizure by the plaintiffs; and Gurley and Barker knew the mortgage was a fraud.

In October, 1883, Gomila owed the plaintiffs a balance of twenty-eight thousand five hundred and seventy-three 13-100 dollars ($28,573.13), p. 93.

On the 31st of December, 1883, plaintiffs drew on Gomila for $2,200, $800, $700 and $11,763.84. All

these drafts were protested for non-payment; Gomila & Co. had failed, pp. 86-89.

On the 1st of July, 1884, the plaintiffs brought suit against Gomila & Co. on these drafts and on an account for $26,731.97. The account annexed to the petition, p. 92, was rendered by Gomila & Co. to the plaintiffs. There was, therefore, no doubt about the correctness of the claim. Notwithstanding the correctness of the claim, J. Ward Gurley, Jr., acting as counsel for Gomila & Co., by exception and answer to the suit, pp. 95 and 96, prevented the rendition of a judgment until January 5, 1885, p. 95. By this it appears that Gurley was well aware of the claim of the plaintiffs and the insolvency of Gomila & Co., and was engaged in delaying the proceedings of the plaintiffs. It was between the protests and the judgment Gurley pretends to have acquired the notes. Gurley, in his evidence, says that he was attorney for Gomila & Co. during the whole of its existence, pp. 136 and 137. We must presume, therefore, that he knew the pecuniary condition of Gomila & Co. These drafts were protested on January 18, 1884, p. 86. On the 7th day of February, 1884, Gomila purchased from the Hibernia Insurance Company the property in question for $10,000, p. 80. He paid for it in cash at the moment of purchase. As is usual, and as is prescribed by law, the mortgage certificate is annexed to the act, showing that there was no mortgage inscribed in the name of the vendor against the property. Bear in

mind that this purchase was made on the 7th of February, 1884. On the next day, 8th February, 1884, p. 82, Gomila appeared before another notary public and declared his indebtedness to the firm of Gomila & Co. for money loaned and advanced to him in the sum of eighteen thousand dollars ($18,000), for which he furnished his four promissory notes, and secured them by mortgage on the property that he had purchased the day before for ten thousand dollars ($10,000), p. 82. The act of mortgage made by Gomila was accepted by L. Torrey, of the firm of Gomila & Co., for Gomila & Co. That this mortgage is a fraud and a sham is not only proved by the evidence, but is admitted by the theory of the defense of all the defendants. The truth is, Gomila was not indebted to Gomila & Co. in any amount, for Gomila was really Gomila & Co. Torrey had but small interest in the profits of the firm, had never put any capital into it, and was himself largely indebted to the firm of Gomila & Co. See evidence of Torrey, p. 36.

This act of mortgage, although made on the 8th of February, 1884, was not recorded until the 18th of February, 1884, p. 85, and therefore had no effect against third persons until it was recorded. *R. S. of La., Art. 2516.*

It was kept secret until 18th February, 1884. There is not annexed to it, as is usual in every *bona fide* mortgage, any certificates that the taxes have been paid; and although Gomila agreed, by the act, to keep the property insured against fire, and transfer the

policy to the holder of the note, it does not appear that he ever insured the property or transferred any policy. The act recites that the taxes had been paid, and Torrey, who accepted the mortgage, expresses his satisfaction, and dispenses with the production of the tax receipts, p. 85. No mortgage certificate is annexed to the act to show whether or not any previous mortgages affect the property, and Torrey dispenses with that mortgage certificate and relieves the notary public of any liability or responsibility for the nonproduction of the mortgage certificate. The absence of such certificate is a circumstance to excite suspicion. *7 La. An. 579.*

It is upon this insufficient, informal and unreliable document that the defendants pretend they loaned their money. We do not think that any person making a real loan would have accepted such a mortgage. By this act of mortgage Torrey was the first recipient of the notes, representing, however, Gomila, for he, Torrey, had no interest whatsoever in them.

The best evidence that this mortgage was a sham and a fraud is that on the 7th of February, 1884, Gomila bought the property for ten thousand dollars ($10,000), p. 80, and on the next day, the 8th, he mortgaged it before another notary for eighteen thousand dollars ($18,000), p. 82. This was to completely cover and protect the property from the pursuit of his creditors. He paid $10,000 for the property; he covered it with $18,000. Instead of buying the property in some other person's name, he chose this means of

mortgaging it for nearly double its value; he wanted the property. He wanted it in his name, and he thought this the best way of covering it.

We have it, now, that this act of mortgage is a fraud.

By reason of the pleadings, the Court should so pronounce it, without going any further, because the answer of Gomila alleges that this act of mortgage was a *bona fide* mortgage, and given for a valuable consideration; and this answer is signed by J. Ward Gurley, Jr., his attorney. This should be the only issue, and Gurley should not be permitted to abandon that issue after it is shown to be a fraud, and to adopt any other defense, namely, that this mortgage, although a fraud and a sham, is good to secure him, an innocent holder of the notes.

We now proceed to show that Gurley and Barker are not innocent holders of these notes, gave no consideration for them, and had notice that the mortgage was a fraud and a sham; that they are the instruments of Gomila to cover his property. The defendants, of course, were the most important witnesses in this matter, for if there be any fraud they all were careful to conceal the fraud, and give the transaction an appearance of honesty.

The act of mortgage recites that Torrey accepted the mortgage. The act of mortgage was passed at the office of the notary public. Torrey must have received the notes (if he received them at all) in the office of

the notary public. In his testimony, page 37, he says he received them at the office of the firm, from Mr. Gomila. He says Gomila was with him there, and at the very moment he received them he put them in the hands of Gurley, and he borrowed money on them at the time he put them in the hands of Gurley, and gave them to Gurley as collateral security.

He says that he borrowed from Gurley, at the moment he delivered the notes to him, on 6th of February, $3496.50. The truth is that on the 6th of February the notes were not in existence, for they were not made until the 8th of February. The amount, $3496.50, is a strange amount to borrow. For that amount he unnecessarily gave Gurley $18,000 of mortgage notes. He says that on *February 11th* he borrowed $1498.50. The mortgage had then not been recorded in the mortgage office; it was recorded on the 18th February. This amount is also a strange amount to borrow. He says that on the *20th of May* he borrowed $1000. Gomila, in his answer, page 14, says that the $1000 were borrowed on *20th February*, 1884. Gurley, in his answer, page 20, says that he loaned *$1000 on 20th February*, 1884. There was no act of pledge to Gurley. There was no note or evidence of a transaction of indebtedness, or of the transaction made with Gurley. There was no stipulation as to the interest, or time of payment, p. 38. The whole transaction appears, by the testimony of Torrey, to have been made by *him* with Gurley.

He does not remember, p. 38, whether he received

the money from Gurley by check or in cash. He says he deposited it, and used it in the business; that it went into his books. He avoids stating, p. 39, that Gurley knew at the time the insolvency of Gomila. Although he pledged the $18,000 notes to Gurley, he afterwards withdrew from Gurley two notes for $5000 each, thus treating these notes as if they belonged to Gomila, diminishing Gurley's security of $18,000. The property was only worth $10,000. If the transaction was a true one, is it not strange that Gurley, at the request of Gomila, gave up the security? Torrey says that with the two notes for $5000 which he withdrew from Gurley he borrowed money from the Teutonia Insurance Company by pledging them. When the debt became due, he withdrew the notes from the Teutonia Insurance Company, and pledged them to the State National Bank, p. 40.

In these transactions he gave a note and a pledge to the Teutonia Insurance Co. and to the State National Bank, for these were real transactions. He paid the loan, and then received back the notes, and he then placed them in the hands of Mr. Barker as security for the money which, he says, he borrowed from Barker; that Barker gave him the money in cash, not by check; that no mention of this transaction was made in the books of Gomila & Co.; that he kept no memorandum of the transaction; that of the money he got from Barker he paid $2000 to the State National Bank and the balance to a Mr. Dillingham, but that he made no entry of it in the books, page

42; that he got the money from Barker at three different times, all in the month of November, 1884, and kept no memorandum of dates. Barker gave him no receipt for the pledged notes he gave Barker nor took any note for any money borrowed, nor act of pledge to secure it, page 43; that the transaction was made at the Produce Exchange; nobody was present; that Gomila was then doing business, but no entry was made in the books, pages 43-44; that the books do not show any money paid to Dillingham nor any indebtedness to him; that he was not authorized by Gomila to borrow the money, p. 44; that he made no deposit in bank of the money borrowed; that there was no witness to the transaction but himself; that he does not know on what dates he borrowed the money, p. 44. He now says that instead of the transaction being made at the Produce Exchange it was made at the Louisiana National Bank, p. 44; that the money was handed to him just outside of the bank, somewhere on the street, in the entrance there, p. 45; that Barker went into the bank and got the money and handed it to him at the bank, and gave him the money somewhere on the street near the bank. He says that no rate of interest was agreed upon for the loan; no time for re-payment was fixed; no note was taken; no pledge was given, and no entry in the books, p. 45.

The fact that no entry was made in the books is a strong presumption of fraud. All about the real transactions with the Teutonia Insurance Company and the State National Bank were regularly entered

in the books, but those with Barker were not entered. Three loans are said to have been made by Barker—one for $2000, one for $1000, one for $1000—on different days. Two thousand dollars of the amount are said to have been paid to Mr. Dillingham, a creditor, p. 44, but there was no account in the books with Dillingham, p. 44, no entry of any payment to him, p. 44. The witness kept no memorandum, p. 43. He says there was no written record of the transaction at all, p. 44.

He says that he told Gomila that he borrowed the money, but did not tell him from whom, and does not remember what Gomila said. He hesitates and refuses to admit that the notes were the property of Gomila, page 46, and being asked if Gomila had transferred some of his furniture and wagons, he objects to answering, page 47; being asked whether Gomila and himself went before a notary public, in New Orleans, to prepare documents to enable Mr. Breedlove Smith (who had been a clerk for Gomila & Co.) to attach Gomila & Co's. property in St. Louis, he refuses to answer, page 48. He says, when the act of mortgage was made, no money had been given or advanced to Gomila for the mortgage, page 52.

The counsel for defendants, perceiving that Torrey had testified that he had given the mortgage notes to Gurley, before they were made, endeavored to avoid that impossibility, and make Torrey say something else, but it only made matters worse.

In the cross-examination of Torrey, in which Torrey

was a willing witness, he testified that Gomila paid the Hibernia Insurance Co. $5000 on the house, on which there was a mortgage in favor of the Hibernia Insurance Co., page 58. Torrey, says that this $5000 mortgage was taken up at the same time that the $18,000 mortgage was made. Now, this cannot be true, for Gomila only purchased the property on the 7th of February, and therefore could not have put any mortgage on that property before that date. If there existed a mortgage for $5000 on the 8th of February, it could not have been paid with the mortgage notes, for Gurley pleads and contends that he had loaned $3496.50 on the 6th of February, 1884, which was before the mortgage notes were made, and that he loaned $1498.50 on 11th of February, 1884, which was after the Hibernia Insurance Co. had been fully paid, as stated by them, in the act of February 8th, 1884, p. 82. It is not true that any money was paid to the Hibernia Insurance Co., raised on the 18,000 notes, because the Hibernia Insurance Co. had been fully paid on the 7th day of February, 1884, before the $18,000 notes were made, because in his examination in chief, when his mind was not directed to what the counsel wanted him to testify about, namely, the consideration which Gurley gave for these notes, and the application of that consideration, he stated, page 40, that the money he got from Gurley was not used for the payment of any mortgage, existing on the house, that it was deposited by him in bank, and used in the business of Gomila & Co., pp. 38, 40. If there had

been any previous mortgage on this property by Gomila to the Hibernia Insurance Co. (an impossibility, for Gomila could not mortgage a property before he had purchased it), it would have been easy for defendants to have produced that mortgage, and the testimony of the officers of the Hibernia Insuranee Co. The interest of this witness appears in his testimony, where he answers or refuses to answer, the questions of plaintiffs' counsel, as he is told to do, by the counsel for the defendants, pages 59, 60 and 61. And his refusals to answer are relative to the existence of any account, or any account books, containing entries referring to these transactions.

We now come to the testimony of Mr. Barker, p. 126.

Barker says Torrey told him that he had to pay $2000 to the State National Bank, and asked him if he could loan him $2000 for a few days; that he would give him these mortgage notes on Gomila's house, and he went to the Louisiana National Bank, took a check from off the desk, filled it out to bearer for $2000 and gave him the money. He produced the pretended check drawn to bearer.

With that money the mortgage notes were redeemed by Torrey and went into his possession.

Admitting the truthfulness of the loan of $2000, by this act the mortgage was cancelled, because the notes returned into the possession of Torrey, who held them for Gomila, for when a note secured by mortgage

comes again into the maker's hands before maturity, the mortgage is extinguished by confusion. By reissuing the note, the maker may bind himself, but cannot revivify the mortgage. *Hill vs. Hall, 4 Robinson, 416; Doll vs. Rizotti, 20 An. 264.*

Barker had notice that the mortgage was cancelled, for he was requested by Torrey to lend the money to pay the note and take up the mortgage note. The note was paid, the mortgage note returned to the possession of the maker. These notes had returned four times to the possession of the maker—once when the maker received them from the notary, p. 82; once when he withdrew them from Gurley, p. 39; once when he withdrew them from Teutonia Insurance Co., p. 41; once when he received them from the State Bank, p. 41.

By reissuing the notes the maker may bind himself, but cannot revivify the mortgage securing it. The note may be negotiable, but the mortgage is not. The rule is that an assignee before the maturity of a negotiable note secured by mortgage takes the mortgage as he takes the note, free from all objections to which it was liable in the hands of the mortgagee; but he must be an innocent holder, he must not have known of the objection to the mortgage. He must not have known that it had been cancelled by confusion, by returning to the maker. When it has returned to the maker, to the knowledge of the holder, the maker by reissuing it may bind himself, but cannot vivify the mortgage.

In *Hill vs. Hall, 4 Rob. La. R. p. 417*, the Court said: "The evidence shows that they came back into the hands of the maker sometime after that date and before maturity. From the moment John S. Walton became the owner of these notes, drawn by himself, the debt evidenced by them was extinguished by confusion. Civil Code, Art. 2214. But it is argued by the appellant's counsel that the extinction of the debt between John S. Walton and Joseph G. Walton did not incapacitate the former from contracting a new debt to Hill and handing to him over as evidence of it the same notes secured by mortgage on his property; that Hill could have recovered on these notes from John S. Walton, and can, therefore, pursue his property, which has since been sold subject to the debt. To this argument the answer is obvious, that the notes thus reissued by the drawer undoubtedly bind him, but that by replacing them in circulation he cannot revive the obligations of the other parties to the notes or the mortgages on the defendant's property, which being only an accessory to the debt between the maker and the payee became null and void as soon as the debt itself was extinguished. Civil Code, Arts. 3252–3374."

In *Schinker vs. Hanewinkel, 19 La. An., p. 200*, the Court said: "It appears, then, that this note had come in the hands of the maker, who reissued it to Webber two months after maturity. Webber acquired, knowingly, an extinguished paper, and the mortgage was also extinguished and could not be revived. C. C.,

Arts. 3374, 2214; 4 Rob. 416; Hill vs. Hall, 4 Rob. 417."

Walker was not an innocent holder, because he acquired it *after maturity*, and therefore is supposed to know the objection to the mortgage. Barker knew the ojection, and is not an innocent holder, for he says he lent the money to enable Gomila to redeem the mortgage note. He knew the maker had pledged it, and it had returned to his possession.

In *Garner vs. Gay, 26 La. An., p. 376*, the Court said a mortgage is not commercial paper, governed by the rule invoked by defendant.

In *Butler vs. Slocumb, 33 La. An. 175*, the Court held the owner must be an innocent holder, and not know the objection to the mortgage.

In *Schepp vs. Smith, 35 La. An., p. 4*, the plaintiff was permitted to enforce the mortgage, because he did not know the objection to the mortgage, and by diligent search and inquiry could not have ascertained anything beyond the mortgage act.

In *Carpenter vs. Longan, 16 Wall., p. 273*, the mortgage was enforced because the plaintiff was an innocent holder, and had no knowledge of the objection to the mortgage.

In *Sawyer vs. Grockett and Wife, 19 Wall. 147*, the mortgage was enforced because the plaintiff was a *bona fide* holder, and was not aware of the objection to the mortgage.

The rule applies not only to a party who is not a *bona fide* holder, and has knowledge of the objection

to the mortgage, but it is settled that if anything appears to him calculated to attract attention or stimulate inquiry, the person is affected with the knowledge of all that inquiry would have disclosed. *2d Pomeroy's Eq. Jur., Vol. 2, Sec. 608; Waite Fraud. Convey., pp. 374, 490, 491, 493, 495.*

In *Schmidt vs. Frey and others, 8 Rob. La. R., p. 441,* the Court said: "Persons receiving negotiable notes, secured by mortgage, cannot be benefited by their neglect to examine the acts with which the notes are identified."

The notes held by Barker returned four times into the possession of the maker, Gomila, and those held by Gurley returned once.

When the notes were made and secured by mortgage, they were delivered by the Notary to Gomila, the maker, p. 82; for Torrey, who accepted the mortgage, was but a party interposed for Gomila. Torrey, p. 37, says he received them from Gomila. He placed them in the hands of Gurley. He subsequently withdrew two from Gurley, p. 40. He pledged them to Teutonia Insurance Company, p. 40. When he paid the pledge he got them back, p. 40. He pledged them to the State National Bank; when he paid the pledge he got them back. He gave them to Barker.

The notes held by Gurley, Gurley received from Gomila, the maker of them. He must have known that Gomila could not hold a mortgage on his own property.

We have shown not only that the act was originally

a fraud, but that Gurley and Barker knew it. They had full knowledge of the fraud. A simple inspection of the act was sufficient to give them notice of the frand.

We continue our comments on the testimony of Barker.

It appears by his testimony, page 126, that he drew the check and the money at the Louisiana National Bank, and there gave the money to Torrey. Torrey has stated that this was done at the Produce Exchange. Barker says, page 126, that after this was done, Torrey gave him the notes; he therefore had full knowledge that these notes were being given him by Torrey for Gomila, the maker of the notes. This had the effect of cancelling the mortgage.

Barker says, a few days after, Torrey asked him for another thousand dollars, and he went to the bank and drew a check in the same way, and gave him the thousand dollars. He produces the pretended check. This was, he says, on 10th November. A few days after, he says, Torrey asked him for another thousand dollars. He drew the check in the same way, and again gave him the money in the same way. He produces the pretended check.

All the checks are payable to bearer. He says that the two notes for $5000 each were given to him to secure these loans. He says Torrey wanted some money afterwards, but he would not lend it.

This is the evidence to establish these loans by Barker.

Torrey in his testimony says, that they were made at one place, and then that they were made at another place. Barker does not say that they were made at the same place as Torrey says they were made. We find Barker lending money upon a security that he had never seen, for they were then, and before that time, in the possession of the bank. He had no knowledge of the mortgage act, by which they were secured; he did not know whether that mortgage act was any security; he did not know whether there were not previous mortgages upon the property; whether the taxes had been paid; whether the property had stood in the name of Gomila, at the time the mortgage was made; he did not know how much more money there was upon the property than the $10,000 notes that were said to be pledged to him; he did not inquire into the right and ownership of Torrey to these notes. It is strange that every time a check was drawn by Barker, it was drawn, not in the office of Barker, but at the bank, that the money was drawn by Mr. Barker, and not by Torrey. It is strange that Barker took no note or other evidence of indebtedness from Torrey, at the time he says he made the loan. That no time for repayment was fixed; no rate of interest was agreed upon. It is strange that he made these transactions with Torrey and with Gomila, with men, to his knowledge notoriously insolvent.

The plaintiffs, to prove the incorrectness of Barker's testimony, called upon him to produce his check book, from which these checks were taken. In his exam-

ination, page 133, he is asked whether he has the stubs from which these two checks were taken? He says, "I have not."

Q. From which any of them were taken?

A. No, sir.

Q. Did you keep a check book with the Louisiana National Bank?

A. Sometimes.

Q. Have you got that check book?

A. That these checks came from?

Q. Have you got that check book of November 9th, 10th and 13th? p. 133.

A. I do not remember, I believe I have; I took those checks from the desk in the bank.

Q. Do you or not know whether you got a check book for November 6th, 10th, and 13th?

A. Very likely I have; I do not know.

Q. You do not know?

A. I do not know.

Q. You did not tear it up?

A. No, sir.

Q. Hey?

A. No, sir. I had an account there for a good many years, I sometimes write a check in the book, and sometimes go into the bank and take up a blank check.

Q. If you draw a check outside of your office, would you not enter it on your check book, when you got back to your office?

A. No, sir; not necessarily.

Q. Well then how would you make your check book balance?

A. I never—it to balance in my life.

Q. Mr. Barker, you are requested to produce your check book for November, 1884. P. 133.

The Court will perceive how this witness has thrown guards around himself. The checks that he produced are all payable to bearer, p. 34; they may have been drawn for any other purpose than for this pretended transaction; the money was all drawn by Barker, himself; although he kept a regular account with the Louisiana National Bank for many years before Oct. 8th, 1883, page 110, he says that he sometimes kept a check book with the Louisiana National Bank. When asked, "have you got that check book? (meaning the check book for November, 1884)," he hesitates and answers, "that these checks came from the desk in the bank." Being asked the same question again, he says, "I do not remember; I believe I have; I took these checks from a desk in the bank." Being urged to answer whether he had the check book of Nov. 6th, 10th and 13th, p. 133, he answers, "very likely I have; I don't know." Now, all these answers are untruthful, because the witness does know whether he kept a check book with the Louisiana National Bank, and whether he had a check book for November, 1884. Being forced to produce in Court the check book, which he acknowledged to have, it appears by the check book, which he produced, pages 110 to 117, that he kept a check book from October 8th, 1883, to July

15th, 1886. By this check book, produced by him, it appears that all the stubs of these pretended checks have been abstracted from the check book. The abstraction would very clearly appear to the Court, if the Court had the original check book before it; but it will also satisfactorily appear by the copy of the check book, which is on pages 110 to 117. On page 110, the stubs begin October 8, 1883, and continue to March 8, 1884, inclusive, p. 112. Every stub shows to whom the checks were given; some of them show the consideration for the checks. The last check was March 8th, 1884. These pretended loans of Barker to Gomila are said to have been made in November, 1884; all the stubs during November and from March 8th, 1884, to March 21st, 1885, are missing from the stub book. Of course, Barker did not abstract only the stubs of these checks, which he offers as evidence of his loan to Gomila, for if he had, the presumption would have been too heavy against him; therefore, he abstracted all the stubs from March 8th, 1884, to March 21st, 1885.

If these stubs had not been abstracted they would have shown for what purpose the checks were drawn. Having been abstracted, the presumption is, they would have destroyed the defendants' claims. We say they would have shown for what they were drawn, for every stub in the check book pp. 110, 117, shows for what the check was drawn, or to whom it was given.

In the place in the stub book, immediately after where the abstracted stubs were, the stub book begins

No. one, March 21st, 1885. That the checks were abstracted, as we have stated, is conclusively shown, because on that date, March 21st, 1885, this stub book shows a balance brought forward of $915.55. Now this balance must necessarily have been a balance left after computing the abstracted stubs, for it is not brought down from the stub of March 8th, 1884, from which date, the stubs were abstracted. The balance in this stub book, $915.55, March 21st, 1885, indubitably shows that it is a balance computed from and including the stubs abstracted from the book. Again, we call the attention of the Court to a circumstance that tends to show the fraud. The stubs up to March 21st, 1885, as we have stated, have been abstracted from the check book. The date, March 21st, 1885, is very significant. Barker must have abstracted them just about that time. He had an object in abstracting them at that time. Our suit to cancel his mortgage was brought against Gomila on April 9th, 1885; it was about that time that he received intimation that such a suit would be brought. It was about that time he began to look for evidence, or to destroy evidence, and therefore he destroyed these stubs—up to or nearly to that date. These checks produced are checks that were made by Barker for some other transaction. It is very significant that on that date, March 21st, 1885, he began by numbering his stubs, one, two and so on, and kept them regularly numbered.

An examination of the books of Gomilla shows that

no entries were made relative to these pretended loans, p. 69.

The transactions with the Teutonia Insurance Company and with the State National Bank were undoubtedly real. They are properly entered in the books, pp. 69, 70. But the questionable transactions with Barker were not entered.

Torrey says: The transaction was not entered in the books, "because we had no bookkeeper, and I knew the transaction would show for itself at any time," p. 44. He says: "I think the last entries made in these books were in October, 1884." At page 35 he says the firm lasted to the beginning of 1885. Being asked, "Have you got any memoranda, books or papers of any kind in which the transactions—some, or all of them—of Gomila & Co. have been entered since November, 1884?" The counsel for the defense objected to the question as leading, and also as impertinent, and the witness refused to answer, p. 41.

We are justified in concluding that there exists another set of books which would show the claim of these defendants to be fraudulent. Remember that Torrey is not a simple witness; he was one of the defendants, and charged as a confederate of Gomila and others. On the 9th of June, 1884, Gomila writes to the plaintiffs that, unless they accept his proposition, "we are advised by our friends to give up and start in some other name without further delay," pp. 85, 86.

Mr. Barker being asked, page 128: "Have you had any business relations with Gomila & Co., and if yea,

from what time to what time?" answered, "I believe that I have bought some grain from them, occasionally—from Mr. Gomila, or Gordon & Gomila, once in a year, or twice in a year, ever since."

Q. Have you sold grain to them, or bought grain for them?

A. I think I have bought some grain for them, and I have bought grain from them.

Mr. Torrey, page 35, says:

"Barker has done business with the firm of Gomila & Co. for several years; commission business; buying and selling grain; broker, ever since there was a firm existing, I think—from 1882 to 1885." Barker does not know when the credit of Gomila & Co. ceased to be good, p. 128.

Gurley objected that Barker should state what he heard about the credit of the firm. He does not know that they have failed to meet their obligations; he heard so. "When did he hear so?" Mr. Gurley objects to the question.

Barker says, on page 27, that he told Torrey that unless he, Torrey, paid that money within a certain number of days he would consider those notes as his own, and Torrey agreed that they should be. Can there be any greater evidence of fraud than this? Here was Barker, who pretends to have loaned $4000, for which he held two notes of $10,000, made by Gomila and secured by mortgage, claiming the full ownership of the notes if his money was not paid; and here is Torrey, consenting that Barker should own the

$10,000 notes, secured by mortgage, for a pretended debt of $4000, to the injury of the Rio Grande Railroad Company.

Such a transaction is not mercantile, nor usual, nor probable. The object of this testimony is to enable Barker to claim the whole proceeds of this property if it should sell for more than sufficient to pay the actual amount which he pretends to have loaned. The same thing was done with Gurley. Gurley says that Gomila gave him these notes, not only to secure the items specified by him, but that Gurley should keep the mortgage notes to secure whatever else Gomila should owe him, pp. 140-141; and that amount which Gomila owes him amounts to more than the amount of the notes held by him. This is in order to cover the surplus, if any, after paying the amount which Gurley pretends he advanced to Gomila on these notes. In other words, Gurley and Barker say that Gomila agreed that because he did not pay them the amount that they claimed, namely, by Gurley, $5905, and by Barker, $4000; that they should become the creditors of Gomila, secured by a mortgage of $18,000. Such a transaction is not usual, not probable.

We now come to the testimony of Mr. Gurley, one of the defendants; he was purposely the last witness to testify; he had before him the testimony of all the other witnesses. Mr. Gurley says:

" The firm of Gomila & Co. became, as I understood, temporarily pressed for money, owing to unexpected,

rapid and large drafts upon them without notice, and Mr. Gomila told me that in order to maintain the credit of the firm and continue prompt payments without heavy sacrifices, he would be obliged to borrow money upon his residence." The facts are that the firm of Gomila & Co. was not *temporarily* but *permanently* pressed for money. This conversation must have occurred in February, 1884, for it was then the mortgage was made. Gomila & Co. had been protested in December, 1883, upon drafts drawn by plaintiffs; their indebtedness then exceeded $81,000, p. 62. They never paid the plaintiffs; they were sued by the plaintiffs and judgment rendered against them. The small amount which Mr. Gurley pretends to have loaned them could not maintain the credit of the firm nor enable them to make prompt payments; they made no payments. Mr. Gurley says in his answer, p. 20, that $5000 of moneys advanced by him (now, he only pretends to have advanced $5995) were advanced by him to enable A. J. Gomila individually to pay the Hibernia Insurance Company the balance due upon the purchase price of the property. If this be so, we cannot understand how any advances made by Mr. Gurley would have enabled Gomila to meet the large indebtedness of his firm, nor that it could have any effect to maintain the credit of his firm, nor to enable him to continue prompt payments without heavy sacrifices. Mr. Gurley in his testimony, p. 137, says: "The money was advanced to the firm to *enable the firm to continue its business.*" Mr. Gurley in his

answer, p. 20, says: "the money was advanced to Mr. Gomila individually *to pay upon the property.*"

Mr. Torrey says, p. 38, that he received the money and deposited it, and used it in the business of the firm. In the midst of these contradictions, we do not know which statement is true. Mr. Torrey was made to produce the books of the firm. The order to produce them was, page 28, "that he leave them with the examiner until the further order of the Court; that the plaintiffs, their solicitors and agents, be at liberty to inspect them and take copies from them." This order, as the Court will notice, was issued to Mr. Torrey, one of the firm of Gomila & Co. Gurley then appeared, although the order was not directed to him, and by an *ex parte* order caused this order to be vacated as being improvidently granted, and directed the Rio Grande Railroad Company to take a rule on said Torrey to show cause why the order should not be made. The rule was taken. Gurley caused that order to be amended by adding thereto, as follows, page 30: "It is not intended by this order that any examination or inspection of the books, when produced, shall be made by anybody present beyond that which is necessary to enable the *examiner* to verify the statement of such witnesses as may be examined with reference to the items or statements in the books relating to the subject matters of the suit in which the testimony is to be used; nor is it intended that the books shall be left with the examiner from day to day, but that they shall be, after each examination, in

the possession of defendant or counsel for defendant; that the books shall be examined only in the presence of the parties or attorneys." Thus, by this order, Gurley excluded evidence, and succeeded in depriving the plaintiffs of all the benefit they may have expected to have derived from an examination of these books. The right to use these books was so restricted by this order that a proper examination was denied. Every presumption should be adopted against a litigant who suppresses evidence that would illustrate his case. *Morgan vs. Yarborough, 5 La. An. 324.*

From the little examination that was permitted under this order, Mr. Charles Maduel, a bookkeeper, testified, page 67, that it appeared from these books that there is a credit on 6th February, 1884, to loan account from J. Ward Gurley of $3496.50; on 11th February, 1884, $1498.50; and no entry of any credit on 20th February, but a credit of $1000 on 20th of May. It is impossible to say from these books what use had been made of these credits, page 69. On the 6th February cash is debited $24,537.19, and it is credited $35,427.20; so that it appears that they paid $10,890.01 more than they had in cash. The books, therefore, were dishonestly kept, but certainly show that the money which Gurley pretends to have advanced, to pay a pretended mortgage, was never used to discharge any mortgage on the house, nor used in any way to pay for the property. The alleged reason for the loan has exploded.

Mr. Gurley, in his evidence, page 138, says: "It

was agreed that the first five thousand dollars that I should give him should be paid to the Hibernia Insurance Company for the balance of the purchase price due it, and that as soon as it was paid he should give me a mortgage, and place in my hands *all* of the notes, upon which I should from time to time lend him such money as I could, and if he needed more than I could lend him, and if I felt sufficiently secured, give him a part of the notes to raise money upon elsewhere."

These words mean that the agreement was made before the mortgage was made, and it also means that the agreement was made after the mortgage was made. Now, which is it? When he says that it was agreed that the first $5000 that he should give him should be paid to the Hibernia Insurance Company for the balance of the purchase price due it, it certainly means that that money should be paid before, or at the time of purchase.

The words, "he should give me a mortgage and place in my hands all of the notes," contemplated that all of the notes that already existed were for $18,000. We see no reason why Mr. Gomila should give to Mr. Gurley a mortgage for more than he actually advanced, and a mortgage for $18,000, to secure only a small sum of money. The money that Mr. Gurley says he advanced under this agreement to Mr. Gomila was not advanced for any such purpose, and if it was, it was never used for any such purpose. The first money that is pretended to have been advanced is $3496.50 on the 6th of February, 1884, p. 80. On that date Gomila

was not the owner of the property; he only acquired it on the 7th of February, 1884. We have already seen that Torrey said that the money he received went for the business of the firm and not for the payment of the property. The next sum that Mr. Gurley pretends to have advanced is $1498.50 on the 11th of February, 1884, p. 20. None of this could go to the payment of the property, because by the act of sale the property was fully paid for on the 8th of February, 1884, page 80. The Hibernia Insurance Company acknowledged on the 8th of February, 1884, that they had received $10,000 in full payment of the property from Gomila & Co. The next money which Mr. Gurley, in his testimony, pretends to have advanced is $1000 on the 20th of February, 1884. This date is sworn to by Mr. Gomila in his answer to interrogatories, p. 14, and no doubt Mr. Gurley wrote these answers, for he was the attorney of Mr. Gomila. Mr. Gurley in his answer, p. 20, says that he advanced these $1000 on the 20th of February, 1884, the same date stated by Mr. Gomila, p. 20; none of this money could have been used for the payment of the property, for the property was paid for on the 7th of February, 1884. Mr. Gurley, in his testimony to prove the advance of the $1000, produced a check, p. 139, in favor of Gomila & Co., dated May 21, 1884, and he wants to make that check answer to prove his claim of $1000 of the date of February 20, 1884, on the ground that he made an error of date. He explains the error. He produces a check, dated May 21, 1884, p. 139, and ex-

plains the error by saying: "I found that I was mistaken in the date of the third payment, as alleged in the answer. I believe that the answer alleges that the third payment of $1000 was made in the month of February. I can only account for that error from the fact that the other payments were made in the month of February and written the month of February. I fell in the error, not having the check before me at the time. I have looked up the check since, and find it was the 21st of May, and my remembrance, since being refreshed, tells me that is correct."

This reason may apply to the month but not to the day. Mr. Gurley could have produced the stub of his check book, but he did not do so—of this check or any other. The stubs would have connected these pretended loans with the mortgage and his claim with greater certainty than the checks, which could have been for some other transaction.

Suppose the advance was made on May 21st, 1884, it could not have been made to pay for the property, for the property was paid for on the 8th of February, 1884. Mr. Gurley, page 137, makes it appear that the application to lend was made to him by Mr. Gomila individually, and all the conversations and agreements were had with Mr. Gomila. Mr. Torrey says that it was he who made the agreement with Mr. Gurley; that he received every item of money from Mr. Gurley, and when he received the first item on 6th of February, 1884, he gave the mortage notes to Mr. Gurley, pages 37 and 38; that he applied to Gurley for

the loan of money, page 38 ; he avoids stating that Mr. Gomila sent him to Mr. Gurley ; he wishes us to understand that the notes belonged to the firm of Gomila & Co.; he does not remember whether he received the money in cash or in checks ; he says he thinks that Gomila advised him to go to Gurley. The whole testimony of Mr. Torrey precludes the possibility that Gomila had any previous conversation with Gurley, page 38. Mr. Gurley speaks of an indebtedness of Gomila to the Hibernia Insurance Co. for the purchase of the property before the 7th of February, 1884. There is nothing in the record to authorize it ; if such had been the case, it would have been easy to have produced evidence from the Hibernia Insurance Co. to show such to be the fact. But assuming the fact that Mr. Gurley desires to impress upon the Court that Gomila had bought the property previous to 7th February, 1884, and had paid $5000 in cash upon it, and owed $5000 to the Hibernia Insurance Co., it is plain that Mr. Gurley did not lend any money with which the $5000 were paid to the Hibernia Insurance Co., before 7th February, 1884, and the record shows that none of the money which Mr. Gurley pretends to have lent was used to pay any of the other $5000 to the Hibernia Insurance Co. Mr. Torrey says, p. 38, he deposited the money and used it in the business of the firm. These notes for $18,000 were never made to enable Gomila to pay for the property, because the evidence shows that the money that Gurley pretends to have advanced to Gomila was not used for any such

purpose, and it is not pretended that the money which Barker is said to have advanced long after, was used for any such purpose. The record shows that the Barker money was used for a different purpose. See evidence of Torrey, pages 38 to 47.

Gurley, page 139, says: "After he got the money the transfer was made from the Hibernia Insurance Co. to Gomila, before Castel, N. P.; and immediately an Act of Mortgage was passed before Samuel Flower on the 8th of February, and I received the notes—all of them—the mortgage notes mentioned in the bill in this case, amounting in all to eighteen thousand dollars ($18,000) upon the 8th day of February, 1884, or the next day, the 9th.

There must be some error in this. Mr. Gurley says after *he, Gomila*, got the money, the transfer was made from the Hibernia Insurance Co. to Gomila.

But Torrey says he got the first item of $3496.50 after the notes were made, p. 38. The mortgage was made on the 8th February, 1884, p. 82. Thirty-four hundred and ninety-six $\frac{50}{100}$ dollars were not sufficient under any circumstances to pay $5000 to the Insurance Company, especially as they had been used in the business of the firm as Torrey says, p. 38.

Mr. Gurley says: "I received them at the office of the notary, as I now remember." Now, there is error in this. Torrey says he received the notes at the office of the notary public. Torrey says that after the notes were made at the notary's office, Gomila brought them to him and he gave them to Gurley, p. 37; that

Gomila gave them to him at the business office of Gomila & Co. and he afterwards placed them in the hands of Mr. Gurley. All of these transactions were occurring after Gomila & Co. had become notoriously insolvent and there existed an urgent necessity to cover his property from his creditors. Mr. Gurley is an attorney-at-law, and should have had the transactions with him made as they really were—if they existed—and should not have been engaged in such transactions knowing the condition of Gomila & Co. and the claim of the plaintiffs. On page 140 Mr. Gurley says that Mr. Gomila continued to make calls upon him; that he told Mr. Gomila that he could not give him any more money and Gomila asked him to let him have the two $5000 notes, one of them due in two years and the other due in three years; that Gomila said "I am coming out of this difficulty, and all that I need is a little rest from the pressure that is brought to bear upon me, and if you give me these notes I can raise four or five thousand dollars or may be more on them, and I will be all right." "Well, I thought so myself from all I knew of his affairs, and I gave him the two notes. I gave them to him or to Mr. Torrey, I am not sure which, but my recollection is that Mr. Torrey transacted all the business of borrowing money on those notes. At any rate, I returned those two notes."

From this it is impossible to say which it was, Gomila or Torrey, that made the transaction with Mr. Gurley. Sometimes Mr. Gurley says, it all occurred

with Mr. Gomila; then he is uncertain whether he gave the notes to Gomila or Torrey; whereas, Mr. Torrey in his evidence swears that all the transactions were with him, with him individually. Again, we see in the testimony of Mr. Gurley that Gomila wanted the money for his business and not for the property; at other times Mr. Gurley makes it appear that Gomila wanted the money for the property and not for his business. The fact that Mr. Gurley gave up these notes to Mr. Torrey or to Mr. Gomila goes very far to show that Mr. Gurley never was the real owner of these notes. He had no reason to think that Mr. Gomila would have come out of his difficulties, for he knew that Gomila owed upwards of $80,000, and that he was being sued by the Rio Grande Railroad Company for a very large amount.

Mr. Gurley says (page 140) that it was agreed between himself and Mr. Gomila that he should hold these notes for other purposes than for loans of money. Mr. Torrey, who gave him the notes, and pretends to have made the agreement with him, says no such thing. Mr. Gurley says (page 140): "When Mr. Gomila was first asking me to lend him this money, before the execution of the mortgage, he says, 'you know I owe you some money on the bond transaction.'"

From this it would appear that Gomila was asking Gurley to lend him money for other purposes than to pay the debt on the property. Mr. Gurley says (page 140) that "the bond transaction was a transaction in

which I had given him money to invest in bonds, and he had not returned me all of my share of it, and he says, 'besides that I have not paid you any fees for a long time, and I should like, as far as possible, without doing any injustice to any one else, to secure you so that I would execute a mortgage to you, and what money you could lend me I think that I could—I would not need many thousand dollars to get out of this scrape, and the balance of the mortgage notes you can hold to secure you for what I owe you until I pay it up.'"

Here we have an endeavor on the part of Mr. Gurley to extend his right beyond the moneys he pretends to have actually loaned, to extend them to secure fees as attorney-at-law of Gomila. This is totally inconsistent with the testimony of Torrey, and totally inconsistent with the pretended fact that the money was lent by Gurley to pay upon the property. Gurley says, page 141:

"He owed me prior to February 6th, 1884, for costs advanced in the various cases I have referred to, at least fifty dollars...$ 50 00
I think it is nearer a hundred.
For fee due in the Produce Exchange case... 750 00
Fee due in the case of Gomila & Co. vs. Adam Bros., and Adam Bros. vs. Gomila & Co., being two separate cases and important ones, bitterly fought both in the lower court and in the Supreme Court of the State, at least..... 1000 00

That is a very reasonable and small fee for the two cases.

Fee due in the case of Lemoine vs. Gomila & Co.—there were two cases; the first case I defeated entirely, and the second one I stopped—that is to say, they never got a judgment—say 75 00
That is a low fee.

Fee in the case of Gomila & Co. vs. Fuhrer, Boyce & Co., and Gomila vs. Western Union Telegraph Co., both cases about the same thing, and therefore mentioned together..... .... 150 00
That is a reasonable fee and lower than I ordinarily charge.

Fee in the case of Compagnie Commerciale de Transport Vapeur Francais vs. Gomila & Co..... 200 00
This case also went to the Supreme Court and was tried there and won virtually. It was not an out and out victory, but it was virtually a complete victory.

Fee in the case of the Rio Grande Railroad Co. vs. Gomila & Co. I refer to the case in which the Rio Grande Railroad Co. obtained their judgment..... .... .. 500 00

Fee in the case of the Rio Grande Railroad Co. vs. A. L. Gomila, et als. I refer to this present case—services up to the time of his death..... ... . 500 00

Fee in the case of George Otto vs. Gomila & Co..... 100 00

That is a reasonable fee.

Fee in the case of Gomila & Co. vs. Troop & Sons..... 100 00

A very reasonable fee and nothing more than a compensation.

Fees in the case of Gomila & Co. vs Bartlette, Kuhn & Co..... 100 00

Equally reasonable fee.

For the advice and counsel that I gave, it is impossible to specify in detail, and which was almost constant for three years, from August 4th, 1882, up to the time of his death, September 8th, 1885. I would say $900, or $300 per annum, is very reasonable.

In addition to that, I paid the State tax of 1884 on his property—the residence property in question, $63.25."

Mr. Gurley contends that the mortgage notes were pledged to him for these amounts. These amounts are not mentioned nor claimed in his answer. That he received the notes to secure these amounts is inconsistent with the testimony of Torrey, and with his own testimony. Some of these items were not in existence when he received the notes, namely: the two fees of $500, each in the case of the Rio Grande Railroad Co. vs. Gomila & Co., for the suits were not yet instituted. The amount charged, $500, to Gomila is certainly not due by him, and is put there to make up the claim against the notes. Gurley, in that case, was the attor-

ney of Gomila, and his services only delayed the rendition of a judgment against Gomila upon an admitted claim. But these claims of Gurley show that he knew of the inability of Gomila to pay his debts, and of his insolvency at the time he received the notes from Gomila. These claims show a disposition to establish a sufficient indebtedness on the part of Gomila to absorb the property and the mortgage notes. Gurley claimed $3496.50, $1498.50 and $1000, making in all, $5995. He forgot to give the credit of $566.65, May 13th, 1884, which Mr. Maduel, page 70, discovered on the books, until after the credit was accidentally discovered.

About this item of $566.65, Mr. Gurley says, p. 142: "I wanted to say that there has been paid me, as was shown by the books of Gomila & Co. when they were being examined in this case, five hundred and something. I don't remember the amount; $561, I think; from the sale of lots which he purchased in Idaho Springs years before, and when he gave me the check he said, 'I have received this money from the lots, and it is really outside of my business, and I want to pay you that on account of the money that I owe you on the bond transaction, which I ought to have paid you before,' and he says, I wish you would take it and credit me with it. It is, therefore, to be credited on the $1806.45 that I have before spoken of."

The reply to this is: The entry in the cash-book of Gomila & Co. is $566.65 paid to Mr. Gurley, p. 68. The payment is evidently for a transaction with the firm

of Gomila & Co. and not for an individual transaction. Had it been an individual transaction with Gomila individually, as stated by Mr. Gurley, it could not have been paid by the firm and charged to the cash of the firm. The books of Gomila & Co. show that there was no account on the books with Mr. Gurley, p. 68. Had Mr. Gurley not obstructed and prevented an examination of the books of Gomila & Co., p. 30, any doubt about this sum of $566.65 would have been dispelled.

The explanation of Mr. Gurley only tends to confuse the matter. A clear and distinct account is not given of the bond transaction. The amount stated by Mr. Gurley, p. 141, $1806.45, is not evidenced by any account or supported by any facts beyond Mr. Gurley's statement of what a dead man said. Mr. Gurley's testimony was taken on 20th February, 1886, and he then undertakes to state verbatim, p. 140, what Mr. Gomila stated on 20th May, 1884, p. 68, relative to the $566.65, and his statement conflicts with the entry in the cash-book, p. 68, where the entry of the $566.65 is made.

Mr. Gurley is involved as a claimant of everything valuable belonging to Mr. Gomila.

The plaintiffs seized a judgment in favor of Gomila & Co. against Culliford & Clark for $23,993.76, p. 98; also a judgment in favor of Gomila & Co. against Milliken and Kehlor Bros. for $4442, p. 101; also the residence of Gomila, in New Orleans.

Mr. Gurley claimed by his opposition, filed in court,

p. 120, one-half of the judgment against Culliford & Clark for his fee for obtaining judgment, and alleged, in his claim, that the other half belonged to Messrs. Rouse & Grant. They are the attorneys of Mr. Gurley in this suit. He claimed the one-half by agreement with Gomila.

Mr. Gurley, by his opposition, p. 120, claims for his fee one-half of the claim against Milliken and Kehlor Bros., p. 120, and that the other half belongs to Messrs. Rouse & Grant.

Mr. Gurley shows that he was counsel for Gomila & Co. in many suits, for which he charges and claims fees amounting to $4425, p. 143, but the suits we have seized are the only ones for which he claims to have made express agreements with Gomila & Co. for a fee of one-half the amount recovered. Everything we have seized, Mr. Gurley claims. He claims nothing of what we have not and could not have seized.

Mr. Gurley claims to have a mortgage on the residence for $8000, and Barker claims one for $10,000. The whole, for $18,000, was at one time claimed by Mr. Gurley; and, in order more effectually to deprive plaintiffs of the benefit of their seizure, he has caused, pending this suit, one Mrs. Virginia H. Bullitt, of *Indiana*, otherwise to us unknown, to issue a writ of seizure and sale of this property on the identical notes that he, Gurley, holds, and are now the subject of this suit. Mrs. Bullitt is represented by the same attorneys that represent Mr. Gurley, p. 102.

Thus all the property of Gomila was partially or wholly claimed by Mr. Gurley.

Mr. Gomila told the witness Avendaño, p. 74, that he would never pay the Rio Grande Railroad Company. He wrote a letter to the Company, p. 85, that unless the Company accepted his proposition, he is advised by his friends "to give up and start in some other name."

As soon as a judgment was rendered in favor of Gomila & Co. against Kehlor Bros., on 10th March, 1885, p. 101, in the City of New Orleans, on the same day in the City of St. Louis where Kehlor Bros. resided, the judgment was attached at the suit of Breedlove Smith, who was at one time a clerk of Gomila, p. 48, and had been "connected" with Gomila & Co. "Connected" is the word used by Mr. Torrey, p. 48.

Mr. Torrey was asked about that attachment. He was asked, p. 48: Q. Do you know that since it, the judgment, was rendered, Gomila & Co., either Mr. Gomila or you, or both, went before Hero, notary public, and prepared documents to enable Breedlove Smith to attach property in St. Louis?

Counsel for Mr. Gurley objected to the question and advised the witness not to answer the question.

The witness refused to answer, p. 48.

The record of the St. Louis court was subsequently produced, pp. 104-109. It shows that Breedlove Smith sued A. J. Gomila and Larned Torrey for $13,200 on an account showing that balance due Breedlove Smith. It was instituted on the 10th March, 1885. The claim

of A. J. Gomila and Larned Torrey against Kehlor Bros. was attached on the 11th March, 1885.

The appearance of A. J. Gomila and Larned Torrey was filed, p. 108. It was signed by them on the 8th April, 1885, in New Orleans, in the presence of A. Hero, Notary Public, p. 108, and forwarded to St. Louis. Although the claim of Breedlove Smith was for $13,200, and sworn to by S. R. Francis to procure the attachment, Smith withdrew $5500 of the claim, and by consent the cause was submitted to the Court for trial on 13th April, 1885, one month after the institution of the suit, and judgment was rendered against Gomila and Torrey for $7700, pp. 108-109.

On p. 77 Mr. Torrey is asked:

Q. Did not Gomila & Co. permit judgment rendered in their favor against Kehlor Bros. and Milliken to be attached by Breedlove Smith?

A. I did not know that Breedlove Smith had attached a judgment of that kind.

Q. Didn't you and Gomila, or either of you, get him to do it?

A. No, sir; I did not do it.

Q. Did not Gomila get him to do it?

A. I did not know that he did.

Q. What aid did you and Gomila give Breedlove Smith in this attachment suit?

A. None at all that I know of, p. 77.

The record of the Breedlove Smith suit in St. Louis was produced, p. 108, and it shows that the appearance in the suit was made by both Torrey and Gomila,

and is signed by them, and it says: "Said defendants consent that said case may be submitted to the said Court for trial at any time without a jury, p. 108. Both Torrey and Gomila appeared before Andrew Hero, a Notary Public, p. 108, in New Orleans, and acknowledged their signatures to the appearance, and executed it in his presence, p. 108. This was on the 8th April, 1885; on the 13th April, judgment was rendered against them in favor of Breedlove Smith, p. 108.

This claim of Gomila & Co. against Kehlor Bros. is the same one that Mr. Gurley says one-half belongs to him for fees. It is strange, then, that Mr. Gomila and Mr. Torrey, the two brothers-in-law of Mr. Gurley, should have been engaged in helping Breedlove Smith to attach that which Mr. Gurley says belongs to him, by agreement with Gomila. Was Mr. Gurley aware of these proceedings?

The proceedings look like another attempt of Gomila to cover his property from the pursuit of the plaintiffs. Mr. Gurley was the counsel of Gomila and of Torrey and their brother-in-law, and may have had knowledge of these proceedings.

This cause was argued before the Circuit Court on June 14, 1886. The next morning the Judge of the Circuit Court rendered his decision. He had very little time to examine the Record. He found for Gurley in the sum of $6315.70, subject to a credit of $566.65, whereas the amount, without the credit, claimed by Gurley in his answer was only $5995, page 20. He found that "$5000 of this money was used to pay so

much of the purchase price of the property, mortgaged and borrowed for that purpose, and the balance of said sum was subsequently lent at the request of Gomila & Co." It is impossible that this finding be correct, for only one item of the money alleged to have been lent by Gurley, namely, $3496.50, could possibly have been used to pay for the property, for the other pretended loans were made on days subsequent to the payment for the property, and the evidence shows that this item, $3496.50, on the 6th of February, 1884, was not used to pay for the property, but was used (if ever borrowed by Gomila & Co.) for the business of Gomila & Co.

He found that "$5000 was used to pay so much of the purchase price of the property, mortgaged and borrowed for that purpose, and the balance of said sum was subsequently lent at the request of Gomila & Co." Now, this cannot be correct, for it is alleged by Gurley that he advanced $3496.50 on the 6th of February and $1498.50 on the 11th of February, and $1000 on the 20th of February, and it is an indisputed fact that the Hibernia Insurance Company was fully paid in cash on the 8th of February, 1884. He found that, subsequently to the first loan and before the maturity of said notes, and before complainant obtained his judgment against Gomila & Co., Gomila & Co. gave Gurley a further pledge upon said notes to secure money for costs advanced and fees due as attorney for them to the amount of $6315, subject to a credit of $566.65, and the said Gurley is entitled to hold said

notes to secure said fees and advances, and to collect the same and to apply the proceeds thereof to the full benefit of said mortgage.

This is in direct opposition to the pretended contract of pledge as testified to by Mr. Torrey, one of the defendants, the person from whom Gurley received the notes. $6315 are not claimed for fees in Mr. Gurley's answer; no amount for fees is claimed in the answer. In his testimony he states certain fees for which Gomila & Co. are indebted to him. All the fees stated by him only amount to $4425, pp. 141, 142.

And some of them, the item $500 fee in Rio Grande Railroad Company vs. Gomila & Co., and the item $500 fee in Rio Grande Railroad Company vs. Gomila & Co., p. 142, could not have been secured to him by the pretended pledge, for these suits had not been instituted when the pledge is said to have been made. The first suit was instituted July 1, 1884, p. 91, and the other was instituted April 9th, 1885, and Torrey says he pledged them in February, 1884, pp. 37, 38.

The sum of $6315 found by the Circuit Court was not at issue, and was not before the Court. The only items claimed by Mr. Gurley in his answer are $3496.50, $1498.50, and $1000. The Circuit Court not only allowed these, but $6315.70 more, less a credit of $566.65, p. 147.

The Court found that Gurley acquired these notes before maturity and they were *bona fide*. We have shown that this acquisition, if any, was not *bona fide*.

He had full knowledge of the condition of Gomila at the time the mortgage was made and that the mortgage was a fraud and a sham.

The Circuit Court found that Caleb D. Barker acquired two notes in the sum of $10,000, set forth in his answer, before maturity, *bona fide* and for value, from the firm of A. J. Gomila & Co. to secure the loan of $4000 actually made by him to said firm, as alleged in his answer, and that he is entitled to the whole of said notes for the full benefit of the mortgage to secure said sum, with interest, and to collect the amount thereof and to apply the proceeds to the payment of said loan and interest.

That the Court is satisfied that the defense of J. Ward Gurley, Jr., and of Caleb D. Barker were made honestly and in good faith.

We submit what we have stated about the claim of Gurley and Barker in reply to this.

The mortgage by which these notes were secured was a sham and a fraud, and after the notes were made they came again into the hands of the maker before maturity; the mortgage was, therefore, extinguished by confusion. By reissuing the notes the maker may bind himself, but he cannot revivify the mortgage.

In *Hill vs. John Hall, 4 Rob. La. Rep., p. 416*, it appears that the notes sued on were received by the plaintiff from John S. Walton, the drawer, in July, 1886, in exchange for a note of $10,000 drawn by defendant Hall. The latter then pleaded as peremptory

exception that the notes sued on had been extinguished by confusion, the drawer having become the holder and owner of them after they were made and issued before maturity.

The Court said: "The evidence shows that they, the notes, came into the hands of the maker sometime after their date and before maturity. From the moment that John S. Walton became the owner of these notes, drawn by himself, the debt evidenced by them was extinguished by confusion. *Civil Code, Art. 2214.* But it is argued by appellant's counsel that the extinction of the debt between John S. Walton and Joseph G. Walton did not incapacitate the former from contracting a new debt to Hill and handing over to him as evidence of it the same notes secured by mortgage on his property; that Hill could have recovered on these notes from John S. Walton and can, therefore, pursue his property, which has since been sold, subject to the debt. To this argument the answer is obvious; that the notes thus reissued by the drawer undoubtedly bind him, but that by replacing them in circulation he cannot revive the obligation of the other parties to the notes or the mortgage on defendant's property, which being only an accessory to the debt between the maker and the payee, became null and void as soon as the debt itself was extinguished."

See also *Doll vs. Rizotti, 20 An. 263.*

This rule is only changed when the holder is an innocent holder, without knowledge of the objections to the mortgage.

It is settled that "if anything appears to a party, calculated to attract attention or stimulate inquiry, the person is affected with the knowledge of all that the inquiry would have disclosed."

Carpenter vs. Logan, 16 Wall. 278.

Sawyer vs. Pritkett and Wife, 19 Wall. 165.

Succession Dolhonde, 21 La. An. 8.

2 Pomeroy's Equity Jurisprudence. Vol. 2, Sec. 608.

We have already shown that the mortgage was a sham and a fraud; that Gurley and Barker had full knowledge of the fact.

When the mortgage was made, 8th of February, 1884, Gomila was notoriously insolvent. The fact was well known to Gurley and Barker. They well knew that the mortgage was made to cover his property. The reading of the act was evidence of it.

In *Young vs. Ward, 115 Ill. 264*, it was held "a conveyance made by a debtor in failing circumstances to a son-in-law, cognizant that the conveyance was with intent to defraud the grantor's creditors, was fraudulent as to creditors."

Story Eq. Jur. § 369: If a man should know of a judgment and execution, and with a view to defeat it should purchase the debtor's goods, it would be void, because the purpose is iniquitous.

See *6 Wal. p. 279; 112 U. S. 144.*

In *Richard vs. Ouviere, 10 La. An. 723*, it was held, where a note and mortgage are transferred to one who well knows that it is a mere simulation to protect the property, he cannot afterwards, by paying the maker

the amount of the note, revivify a mortgage that never existed.

In conclusion, we submit we have shown that:

1st. The mortgage was a sham, a simulation, to defraud the plaintiffs.

2d. Gurley and Barker gave no consideration for the notes. They were aware that the mortgage had been made by the insolvent, Gomila, to defraud his creditors. They are not innocent holders.

3d. They received the notes from Gomila, the maker. This was notice to them of the fraud, and that Gomila could not hold a mortgage upon his own property; that the notes and mortgage were canceled by confusion.

Respectfully submitted,

GEORGE L. BRIGHT,

Solicitor for Complainants and Appellants.

MISCELLANEOUS AUTHORITIES.

Effect of relationship upon debtor's transactions. *Wait on Fraudulent Conveyances, Section 242; Twyne's case, 3 Rep. 80; 1 Smith L. Cas. 1; 18 Am. Law Reg. N. S. 137. Wait on Fraudulent Conveyances, Section 22.*

Recital of fictitious consideration. *Wait on Fraudulent Conveyanees, Section 228.*

A transaction which, on its face speaks an entirely different language from the real one, will always be viewed by the law with the highest degree of distrust and disapprobation, and will be the object of doubt and suspicion. *Ib. p. 315, Section 228.*

Inadequacy of price. *Ib. Section 232, p. 320.*

Secrecy a badge of fraud. *Ib. Section 234.*

Mortgage withheld from record, badge of fraud. *Ib. Sections 236, 237.*

If the creditor comes into Court with a fraudulent claim of an absolute title, it is a badge of fraud. *Ib. Section 238.*

Insolvency is an important element of proof in marshalling badges of fraud to overturn a covinous transation. *Ib. Section 239.*

Unusual acts and transactions. *Ib. Section 241.*

Transfer pending suit. *Ib. Section 233.*

The prescription of one year does not apply to simulation, and as to the demand for revocation, prescription begins to run only from the date of the judgment against the debtor. *Phifer vs. Campbell. Manning's Unreported Cases,* decided by the Supreme Court of Louisiana, p. 244.

Revised Statutes of La., Sec. 2516: No notarial act concerning immovable property shall have any effect against third persons until the same shall have been recorded in the office of the Parish Recorder or Register of Conveyances of the parishes where such immovable property is situated.

Civil Code of Louisiana, Art. 2217 (2214): When the qualities of debtor and creditor are united in the same person, there arises a confusion of right which extinguishes the obligation.

Civil Code of La., Art. 3411 (3374): Mortgages are extinguished by the extinction of the debt for which the mortgage was given.

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Supreme Court of the U. S.

No. 114.

OCTOBER TERM, 1889.

THE RIO GRANDE RAIL ROAD COMPANY,
APPELLANT.

vs.

P. S. WILTZ, JR., Dative Testimentary Executor of A. J. Gomila, *et al.*

Brief for Gurley and Barker, Appellees.

STATEMENT.

Some time prior to February 8, 1884, Anthony J. Gomila contracted to purchase the dwelling house and grounds in dispute. Desiring to raise money for the purpose of making final payment of a balance of $5,000 due on the purchase price, and additional sums for use of the firm of Gomila & Co., of which he was a member, he executed a mortgage on the property, in favor of said firm, to secure notes made by him, in the aggregate sum of $18,000. The notes and mortgage were dated February 8, 1884.

All the notes were delivered to the appellee, J. Ward Gurley. Jr., to secure a loan of $5,995, and other indebtedness. Of this sum, $3,496.50 had been advanced on the 6th of February in anticipation of the delivery of the secureties, a further advance of $1,498.50 was made on the 11th of February and an advance of $1,000 on the 21st of May, 1884.

Out of these advances, Gomila used $5,000 to complete the payment of the purchase price of the property. The balance of the loan was used by the firm.

Subsequently, before the maturity of the notes, and before complainant obtained his judgment, Gomila & Co., gave said Gurley, a further right of pledge upon the notes, to secure costs of court, advanced by him and fees due him as attorney, to the amount of $6,315.70, less a credit of $566.65.

Being in need of money, Gomila & Co. applied for further advaces; but being unable to accommodate them, Gurley gave up two of the notes for $5,000 each. These they pledged, August 21, 1884, to the Teutonia Insurance Co. to secure a loan of $5,000, and on October 10, 1884, to the State National Bank, for a similar loan; afterwards, November 5, 1884, (before maturity) to the appellee C. D. Barker, receiving an advance on that day of $2,000, and a further advance of $1,000 on the 10th, and a like sum on the 13th of November, 1884.

Subsequent to these transactions, The Rio Grande Rail Road Co. obtained judgement in the Circuit Court, against Gomila & Co. on the 5th day of January, 1885, in the sum of $26,731,97. This judgment was registered in the Mortgage Office, on the 17th day of January, 1885, and a writ of *fier facias* was taken out and levied on the property covered by said mortgage.

On the 9th day of April, 1885, the appellant filed a petition in the State Court against Anthony J. Gomila, alleging that the $18,000 mortgage was made without consideration, and

for the purpose of covering said property from creditors, and that it prevented a sale under said writ, and praying that the inscription thereof be cancelled and that Gomila be enjoined from disposing of the notes.

This suit was removed into the Circuit Court of the United States upon the petition of Gomila, where the appellees, J. Ward Gurley, Jr. and C. D. Barker were made defendants as holders of said notes. *But no additional averments were made touching the validity of the mortgage, nor were these parties charged with collusion in, or knowledge of the alleged fraud of Gomila, nor was their title to the notes in any manner impeached.*

The court upon all the evidence found against the Complainant, and sustained the title of appellees to the notes, with full benefit of the mortgage, to the extent of their respective claims.

ARGUMENT.

I.

The facts as stated by us cannot be disputed, for both Gurley and Barker testified to having made the loans on the security of the mortgage notes, and produced the checks drawn by them upon which the money was received, and their testimony is not only uncontradicted, but is supported by other evidence.

See evidence of Gurley, R. pp. 136 to 143.
" " Barker, pp. 126 and 134.
" " Gamila, pp. 14 and 15.
" " Torrey, pp. 37, 41, 42 and 53.
" " Lafaye, p.125.

Nothing in the record gives the slightest support to the allegation that the mortgage in question was made by Gomila with the fraudulent design of screening his property from the pursuit of creditors, or that it was made for any other improper purpose.

II.

The Civil Code of Louisiana provides as follows:

"ART. 1970. The law gives to every creditor when there is no cession of goods, as well as to the representatives of all the creditors where there is any such cession, or other proceedings by which they are collectively represented, an action to annul any contract made in fraud of their rights."

"ART. 1971. This action can only be exercised when the debtor has not property sufficient to pay the debt of the complaining creditor, or of all his creditors when there has been a cession or any proceeding analogous thereto."

These articles simply establish the rule that a creditor has no interest to support an action brought to set aside a contract made by his debtor, *unless the debtor has not sufficient property to pay his debts.*

This principle is embodied in Article 1978 of the Civil Code of Louisiana which declares that no contract made by a debtor shall be avoided unless it shall have the *effect of defrauding* creditors, and it averred in the petition that there is not enough property of the debtor left to pay the plaintiff's claim,

Zimmerman vs. *Fitch*, 28 La., A. 454.

In this respect the Code is in harmony with the practice in courts of equity where the creditor is required to exhaust his remedy by execution before resorting to a Bill. In the present case, for ought that appears, complainant might have levied its execution upon other property of Gomila & Co., and obtained satisfaction. Its bill contains no averment to the contrary.

III.

But we need claim no benefit from mere technicalities, as the facts themselves afford a complete defense.

The main objection urged against the mortgage in question is that it was made by A. J. Gomila to and accepted by the firm of Gomila & Co. without consideration and that the note remained in his hands until transferred to appelees, The fact that no consideration passed between the mortgagor and mortgagees, is assumed to constitute fraud, *per se* as to creditors.

The purpose in making the mortgage was to enable Gomila to raise funds for use in his business and to pay a balance due on the purchase price of the property.

It is a common practice in Louisiana to execute a mortgage to a nominal mortgagee as a matter of convenience; and the rights of the mortgagor to issue notes so secured is well settled at the present day, whatever may have been the rulings of the courts of Louisiana in early times.

Schepp vs. *Smith*, 35 La., A. 1.
Merchants Ins. Co. vs. *Jamison*, 25 La., A. 363.
Sucession of Dolhonde, 21 La., A. 3.
Gardner vs. *Maxwell*, 27 La., A. 561.

"A mortgage may be given for an obligation which has not yet risen into existence." Civil Code, Art. 3392.

Gardiner vs. *Maxwell*, 27 La., A. 561.
Roberts vs. *Bauer*, 35 La., A. 456.

The mere fact that the mortgagees were nominal parties and not creditors, did not destroy the validity of the mortgage for if we consider it, for this reason, to have been an unilaterai contract, it was lawful, but did not take effect until the notes were negotiated and issued, when it took immediate effect in favor of the holders.

Roberts vs. *Bauer*, 35 La., A. 453.
Billgery vs. *Ferguson*, 30 La., An. 89.

Richardson vs. *Cramer*, 28 La., An. 358.
Brewer vs. *Gay, et al.*, 24 La., An. 36.
D'Meza vs. *Generes, et al.*, 22 La., An. 285.

An individual member of a firm may grant a motgage to the firm and the notes and mortgage will be valid in the hands of a *bona fide* holder.

Pike, Brother & Co, vs. *Hart & Herbert*, 30 La., An. 868

Even if the mortgage was originally fraudulent.

Bilgery vs. *Ferguson*, 30 La., An. 84, 89.

And mortgage notes may be re-issued by the maker before maturity. 35 La., An. 5.

Morris vs. *Cain, et al.*, 39 La., An. 730.

The case of *Hill* vs. *Hall*, 4 Rob. 416, and *Dale* vs. *Rizotto* 20 La., An. 264, cited by the appellant in support of the contrary doctrine, are overruled by the above cases.

These appellees, therefore, who loaned their money in good faith on the security of the notes, are entitled to the same rights they would have had, if the mortgage had been executed to, and accepted by them, at the date of the loans.

They are presumed to be *bona fide* holders of the notes and mortgage.

Carpenter vs. *Langden*, 16 W., 271.
Schepp vs. *Smith*, 35 La., A. 1.

And this, whether they took the notes in payment, or to secure a pre-existing debt.

Swift vs. *Tysen*, 16 Pet., 1.
Railroad vs. *National Bank*, 102 U. S., 14.

IV.

If we concede the insolvency of Gomila at the date of the mortgage, a fact which is not alleged, it is no objection to the

validity of the mortgage, for a debtor may borrow money and give security therefor, even when insolvent.

Tiffany vs. *Lewis*, 15 W., 410.

Cook vs. *Tullis*, 18 W., 332.

So far as the contract made by Gurley in February, 1884, gave him security beyond the loan then made, for costs and fees, as attorney, due him, it was a preference. But to avoid the contract on this ground it must appear that the obligee *knew* that the obligor was insolvent and the contract must have been made out of the usual course of business.

La. Civil Code, Articles 1984–5–6.

But no contract giving security for a just debt, as a preference, although the debtor was insolvent to the knowledge of the creditor, shall be set aside unless suit be brought within one year from date of such contract.

La. Civil Code, 1987.

St. German vs. *Landry*, 28 La., An. 652.

Seixas et al. vs. *Waterman*, 35 La., An. 1199.

The mortgage, however, is not alleged to have been executed for the purpose of giving an undue preference. The plaintiff rests its case solely on the averment that the mortgage was executed to cover up the property and prevent its seizure and sale.

This both Gomila and Torrey deny, and complainant has failed to prove it.

Neither is there any averment that Gomila was insolvent, nor, if he was, that the fact was known to the appellees; nor that the debtor had no other property than that mortgaged subject to levy and sale to satisfy appellant's judgment. These facts must be alleged and proved in all cases where a preference made by an insolvent debtor is sought to be set aside, for if an insolvent debtor has property subject to execu-

tion, no creditor has any interest to attack a contract giving a lien on specified property in favor of another creditor.

Proof of insolvency and other facts tending to show a preference does not supply the absence of the necessary allegations. The charge upon which the right to relief depends, is that the mortgage was fraudulent because made without consideration: but in suits to avoid an undue preference, the bill admits necessarily the existence of a debt, but seeks to avoid its payment.

V.

The sworn answer of Gurley (R., p. 20) avers that $5,000 of the money advanced, by him were advanced to enable Gomila to pay the Hibernia Insurance Co., the balance due it for the purchase price of the property, and that he believes that it was so applied, and he claims a privilege therefor upon the property in the nature of a vendor's lien.

Torrey testified to the existence of such debt and its payment about that time (p. 58). Gurley says it was agreed that the first $5,000 should be applied to such payment, and as soon as such payment was made, Gomila should give him the mortgage (p. 138).

The act of sale recites that the consideration was paid in cash. The evidence shows that Gomila had in fact purchased the property long before the date of the act and paid a portion of the price, but had received no paper title (R., p. 138). Whether the money received by him from Gurley was paid directly to the vendor, or whether he was paid by check of his firm and that money used to replace it is immaterial. It was in fact and law Gurley's money that went to the payment. To declare his security void and subject the property to the payment of complainant's claim, freed from the incumbrance thus discharged, is a strange thing to ask from a court of equity.

VI.

It is said that there was no act of pledge of the notes to Gurley, as if that were material. The pledge was by delivery which is sufficient under the law of Louisiana. The Civil Code provides that "When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations, or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities shall be valid, as well against third persons, as against the pledger thereof, if made in good faith." Art. 3158.

VII.

Complainant's brief seems to be chiefly directed to attacking Mr Gurley, one of the respondents.

So many of the statements in the brief affecting him are not only unsupported by the record, but contradicted thereby, that we refer to a few of them in order to show the animus of the plaintiff.

It is said in the brief (p. 7) that the original answer of Gomila, stated that the mortgage "was for $18,000 loaned on the 8th day of February, 1884, by the firm of Gomila & Co., to Anthony J. Gomila," and it is further said in the brief (p. 10) "The original answer stated that the act of mortgage was for the consideration therein expressed" when in fact there are no such statements in said answer. Again, referring to Mr. Gurley's answer disclosing the amounts advanced by him upon the pledge of the notes under consideration, it is said in the brief (p. 10) that "before this he had stated that the $18,000, the amount of the mortgage, were actually loaned to Gomila by Gomila & Co.," when in fact he has no where so stated either before or since. Mr. Gurley is quoted, in the brief (p. 45), as saying in his testimony "The money was ad-

vanced to the firm to enable the firm to continue its business" whereas he did not so testify.

The cause, having been removed from the State to the Federal Court, it is said in the brief (p. 4.) that "it was removed for the benefit of Mr. Gurley." Not being a party to the suit, at that time how could it have been for his benefit?

He is charged in the brief (p, 59.) with having obstructed and prevented an examination of the books of Gomila & Co., when the record shows that they were produced and examined by planitiff's expert. (R. p. 68). Besides they are not evidence against him. The brief is filled with charges of fraud in which it is said Gurley participated becaus he knew that the mortgage was given, not for a present loan of money, but, in order to secure sums advanced and to be advanced, and for other indebtedness; when, as we have shown, *supra*, such mortgages are not only valid, but evpressly authorized by the code.

The advances of money by Gurley are spoken of as *pretended* advances, when the sworn answer of Gomila,(p. 37) as well as the testimony of Torrey (p. 37,) and Gurley (p. 138-9,) show that the money was actnally advanced, and there is no evidence to the contrary.

Complainant probably hopes by such statement and charges to prejudice the Court; but we think a fair statement of the facts and a temperate discussion thereof, and of the law upon which he relies would be of more service to him, and more worthy.

Mr. Gurley is a hightoned gentleman, one whose integrity is above suspicion in the community where he has lived all his life.

All who know him would listen to such charges and imputations against him as are contained in the brief with incredu-

ality, and if not better founded, dismiss them with contempt. The decree appealed from, should be affirmed.

Respectfully submitted,

J. D. ROUSE.
WM. GRANT,
For Appellees.

APPENDIX.

The following provisions of the Civil Code of Louisiana, having a bearing upon this case, are here printed for the convenience of the Court:

"ART. 1970. The law gives to every creditor, when there is no cession of goods, as well as to the representatives of all the creditors where there is any such cession, or other proceedings by which they are collectively represented, an action to annul any contract made in fraud of their rights.

"ART. 1971. This action can only be exercised when the debtor has not property sufficient to pay the debt of the complaining creditor, or of all his creditors where there has been a cession, or any proceeding analogous thereto.

"ART. 1978. No contract shall be avoided by this action, but such as are made in fraud of creditors, and such as, if carried into execution, would have the effect of defrauding them. If made in good faith, it cannot be annulled, although it prove injurious to creditors; and although made in bad faith it cannot be rescinded, unless it operate to their injury.

"ART. 1987. No contract made between the debtor and one of his creditors for the purpose of securing a just debt, shall be set aside under this section, although the debtor were insolvent to the knowledge of the creditor with whom he contracted, and although the other creditors are injured thereby, if such contract were made more than one year before bringing the suit to avoid it, and if it contain no other cause of nullity than the preference given to one creditor over another.

"ART. 3292. A mortgage may be given for an obligation which has not yet risen into existence; as when a man grants a mortgage by way of security for indorsement, which another promises to make for him.

"ART. 3293. But the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it. The fulfillment of the promise, however, shall impart to the mortgage a retrospection effect to the time of the contract."

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